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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN R. TESTAN AND FRANCES L. ZARRILLI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, p. 1a) is reported at 499 F. 2d 690.

JURISDICTION

The judgment of the Court of Claims (App. A, *infra*, p. 1a) was entered on July 19, 1974, and respondents' motion to amend the judgment was granted on November 1, 1974 (App. B, *infra*, p. 9a).[1] On

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[1] The November 1, 1974 amendment required the Commission to comply with the Court's directions within 6 months of its original judgment (App. B, *infra*).

October 17, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 16, 1974. On November 19, 1974, the Chief Justice further extended the time for filing a petition to December 16, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

Following the refusal of their agency and the Civil Service Commission to reclassify their positions in the Federal civil service to a higher grade, respondents brought suit in the Court of Claims seeking an order directing their reclassification and back pay from the date on which such reclassification allegedly should have been made. The Court of Claims held that it has jurisdiction to entertain the suit under the Tucker Act and, acting pursuant to the Remand Statute, 86 Stat. 652, remanded the case to the Civil Service Commission to compare respondents' positions with those of employees in another agency who assertedly performed the same duties as respondents. The following questions are presented:

1. Whether the Tucker Act or the Remand Statute gives the Court of Claims jurisdiction over this suit.

2. Whether the Classification Act requires or authorizes the comparison between respondents' position and that of employees in another agency, which the Court of Claims directed the Commission to make, as a basis for determining the correctness of respondents' classification.

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. 1491, in relevant part provides:

> The Court of Claims shall have jurisdiction upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Remand Statute, Pub. L. 92–415, 86 Stat. 652,[2] in relevant part provides:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such order may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such directions as it may deem proper and just.

The Classification Act, 5 U.S.C. 5101, *et seq.*, in relevant part provides:

> § 5101. *Purpose.*
>
> It is the purpose of this Chapter to provide a plan for classification of positions whereby—
>
> (1) in determining the rate of basic pay which an employee will receive—

[2] Now part of 28 U.S.C. 1491.

(A) the principle of equal pay for substantially equal work will be followed;

* * * * *

§ 5107. *Classification of positions.*

Except as otherwise provided by this chapter, each agency shall place each position under its jurisdiction in its appropriate class and grade in conformance with standards published by the Civil Service Commission or, if no published standards apply directly, consistently with published standards. When facts warrant, an agency may change a position which it has placed in a class or grade under this section from that class or grade to another class or grade. . . . these actions of an agency are the bases for pay and personnel transactions until changed by certificate of the Commission.

§ 5110. *Review of Classification of Positions.*

(a) The Civil Service Commission, from time to time, shall review such number of positions in each agency as will enable the Commission to determine whether the agency is placing positions in classes and grades in conformance with or consistently with published standards.

(b) When the Commission finds under subsection (a) of this section that a position is not placed in its proper class and grade in conformance with the published standards . . ., it shall, after consultation with appropriate officials of the agency concerned, place the position in its appropriate class and grade and shall certify this action to agency. The agency shall act in accordance with the certificate, and the certificate is binding on all administrative, certifying, payroll, disbursing, and accounting officials.

STATEMENT

Respondents are employed by the Defense Personnel Support Center of the Defense Supply Agency as trial attorneys with the civil service grade of GS–13. Tr. J. p. 1.[3] On December 9, 1969, respondents requested their agency to reclassify their positions to grade GS–14 on the ground that, according to standards promulgated by the Civil Service Commission ("Commission"), their positions should be classified at that level. Tr. J. p. 4. In addition, respondents contended that their duties were identical to those of attorneys in positions classified as GS–14 in the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base at Dayton, Ohio ("A.F.L.C."), *id.* at pp. 2–3, and that, under the "equal pay for equal work" provision of the Classification Act, they too were entitled to the higher classification. Agency

Both the Defense Supply Agency and the Civil Service Commission denied reclassification, ruling that the positions were correctly classified at grade GS–13 (*id.* at 3–4) under the Commission's classification standards and that a comparison of respondents' positions with those of the A.F.L.C. attorneys would not be a proper method of classification. *Id.* at 5.

Respondents then instituted this suit in the Court of Claims seeking (1) an order directing reclassification as of the date of the first administrative denial

[3] "Tr. J." refers to the opinion of the trial judge. The opinion of the Court of Claims was rendered on the parties' exceptions to the recommended decision of the trial judge (App. A, *infra*, p. 1a).

of their request, and (2) back pay accrued from that date. *Ibid.*

The Court of Claims, in a 4–3 decision, held that the Tucker Act empowered it to adjudicate claims founded upon the Classification Act (App. A, *infra,* p. 3a). On the merits, the court concluded that the failure to compare respondents' positions with those of the A.F.L.C. attorneys was arbitrary and capricious (*id.* at 2a). It remanded the case to the Commission, pursuant to the Remand Statute, Pub. L. 92–415, 86 Stat. 652, to make the comparison and to report the results to the court. *Id.* at p. 3a.

REASONS FOR GRANTING THE WRIT

The Court of Claims in this case has erroneously expanded its jurisdiction under the Tucker Act and the Remand Statute. Moreover, the court has misinterpreted the Classification Act in a way which seriously impairs the Commission's ability to administer the civil service classification system pursuant to the statutory framework of that Act.

1. The decision of the Court of Claims departs from the principle settled as long ago as *Kendall* v. *United States,* 107 U.S. 123, and recently reaffirmed in *United States* v. *King,* 395 U.S. 1, that the jurisdiction of that court is limited to claims for "actual, presently due money damages from the United States." (*id.* at 3). Since this case does not involve such a claim, the court's assumption of jurisdiction constitutes an impermissible exercise of judicial power that Congress has not given it.

Respondents' primary substantive contention is that

the Commission violated the "equal pay for equal work" principle of the Classification Act by refusing to compare their positions with those of persons in other agencies in evaluating the correctness of the level at which their jobs are classified. That assertion, however, does not create a valid claim for money damages under the Tucker Act.[4] That Act confers jurisdiction over only claims for "actual, presently due money damages," but does not create such claims. Whether such claims exist depends on the statutory provisions upon which the complaint is based. See *Eastport S.S. Corp.* v. *United States,* 178 Ct. Cl. 599, 605–607, 372 F.2d 1002, 1007–1008.[5]

[4] The Court of Claims held that it need not consider the applicability of the Back Pay Act, 5 U.S.C. 5596, upon which respondent also relied, because it has jurisdiction under the Tucker Act. The Back Pay Act does not apply to wrongful classification claims. See, *e.g.*, *Ainsworth* v. *United States*, 185 Ct. Cl. 110, 339 F.2d 176; *Dianish* v. *United States*, 183 Ct. Cl. 702; *Coleman* v. *United States*, 100 Ct. Cl. 41. The Back Pay Act permits recovery where an employee has been the subject of unwarranted personnel action that has "resulted in the withdrawal or reduction of all or part" of the compensation to which he was otherwise entitled. Both the language and legislative history of the Back Pay Act demonstrate that it was intended to cover wrongful reductions in grade, removals and suspensions but not claims that a higher classification should have been made. See S. Rep. No. 1062, 89th Cong., 2d Sess.

The Commission has consistently construed the Back Pay Act as inapplicable to wrongful classification claims. 5 C.F.R. 550.803.

[5] There the Court of Claims held that, to state a cause of action within the Tucker Act, it must be alleged that the particular provision of law relied on grants, expressly or by implication, a right to be paid a certain sum notwithstanding that the claim may be based upon the Constitution, an Act of Congress, or an executive regulation.

Thus, implicit in the decision in this case is the theory that a violation of the Classification Act gives rise to a claim for money damages for back pay. This view runs "counter to the settled proposition that the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed" (*United States* v. *King, supra,* 395 U.S. at 4).

There is nothing in the Classification Act waiving the sovereign immunity of the United States in suits seeking back pay for allegedly improper classification of civil service positions. To the contrary, the language and legislative history of the Act and the history of the development of the law governing the relationship between the federal government and its employees show that Congress did not intend to permit such suits.

For many years, individual federal personnel actions were not subject to any judicial review. Thus, courts would not intervene where an employee claimed that he had been wrongfully discharged ,*e.g., Sampson* v. *Murray,* 415 U.S. 61, 69–70; *Keim* v. *United States,* 177 U.S. 290), or improperly been denied a promotion. See, *e.g., Keim* v. *United States, supra; United States ex rel. Boynton* v. *Blaine,* 139 U.S. 306; *United States ex rel. Dunlap* v. *Black,* 128 U.S. 40; *United States* v. *McLean,* 95 U.S. 750; *Decatur* v. *Paulding,* 14 Pet. 497; *Tierney* v. *United States,* 168 Ct. Cl. 77; and *Donnelly* v. *United States,* 133 Ct. Cl. 120, 134 F. Supp. 635.

Although Congress has now specifically provided in the Lloyd-LaFollette Act, 5 U.S.C. 7501,[6] for administrative review of wrongful discharge claims and in the Back Pay Act for the award of money damages for wrongful discharge, the employing agency had broad discretion to determine most matters relating to the terms and conditions of federal employment. The fixing of the proper pay level for particular positions is a matter peculiarly within the discretion of the employing agency. Cf. *Ramspeck* v. *Federal ~~Trade~~ Examiners,* 345 U.S. 128, 137.

Nothing in the Classification Act or its legislative history suggests that Congress intended to alter the long-standing rule that a federal employee is entitled to receive only the salary of the position to which he was appointed, notwithstanding that he may have performed the duties of another position or the claim that he should have been placed in a higher grade. *E.g., United States* v. *McLean,* 95 U.S. 750; *Ganse* v. *United States,* 180 Ct. Cl. 183, 376 F.2d 900; *Amundson* v. *United States,* 128 Ct. Cl. 80, 120 F. Supp. 201; *Price* v. *United States,* 112 Ct. Cl. 198, 80 F. Supp. 542; *Dvorkin* v. *United States,* 101 Ct. Cl. 296, certiorari denied, 323 U.S. 730. Had Congress intended to provide a monetary remedy for erroneous classification, it would have done so affirmatively in the Back Pay Act (which governs money damages for personnel

[6] Limited judicial review of wrongful discharge claims is well-settled. *Sampson* v. *Murray,* 415 U.S. 61; *Service* v. *Dulles,* 354 U.S. 363.

actions) or in the Classification Act itself.[7] It did not do so (see n. 4, *supra*), and in the absence of such provision, together with more than 100 years of consistent judicial decisions precluding such relief,[8] a right to money damages should not be implied.

The Court of Claims erroneously relied upon the Remand Statute, Pub. L. 92–415, as authorizing it to direct the Commission to compare respondents' classification with that of employees at another agency. The Remand Statute is not an independent basis for the court's jurisdiction. It applies only to cases "within [the court's] * * * jurisdiction" (Pub. L. 92–415) and the legislative history confirms that the Remand Statute was not intended to expand the jurisdiction of the Court of Claims. See H. Rep. No. 92–1023, 92d Cong., 2d Sess., p. 3.

[7] Prior to this case, the Court of Claims had consistently held that the Classification Act did not create a claim of money damages. *E.g.*, *Baehre* v. *United States*, 157 Ct. Cl. 943, *certiorari denied*, 371 U.S. 888; *Price* v. *United States*, 112 Ct. Cl. 198, 80 F. Supp. 542; *Coleman* v. *United States*, 100 Ct. Cl. 41. In *Price* the Court of Claims specifically held that the determinative test of a person's right to salary was the position or grade to which he was appointed and not the duties performed.

[8] *Chambers* v. *United States*, 196 Ct. Cl. 186, 451 F. 2d 1045, *Allison* v. *United States*, 196 Ct. Cl. 263, 451 F.2d 1035, and *Pettit* v. *United States*, 203 Ct. Cl. 207, 488 F.2d 1026, on which the Court of Claims here relied (App. A, *infra*, pp. 2a–3a), involved an implied cause of action based upon violation of Executive Orders implementing the equal employment opportunity objectives of the Executive Branch. *But see*, *Gnotta* v. *United States*, 415 F.2d 1271 (C.A. 8), *certiorari denied*, 397 U.S. 394.

Since respondents do not have a claim to "actual, presently due money damages," the complaint should have been dismissed, and the Court of Claims had no power to remand the case to the Commission. See *United States* v. *Jones, Receiver,* 336 U.S. 641.

2. The Court of Claims' order remanding the case to the Commission, for the latter to compare respondents' grade level with that of employees at another agency, is based on a misinterpretation of the Classification Act, 5 U.S.C. 5101, *et seq.* That Act established a position-classification system based on objective standards. Each position is to be placed in the appropriate class on the basis of the duties and responsibilities of the position and the qualifications required by its duties and responsibilities;[9] and each class is to be placed in the appropriate grade on the basis of the level of difficulty, responsibility and qualification requirements of the work of the class.[10]

Each agency classifies its own positions in the appropriate class and grade.[11] The Commission's review of the agency's classification of particular positions is limited to determining if the agency's action was in conformance with or consistent with the Commission's standards.[12]

[9] 5 U.S.C. 5106(a).
[10] 5 U.S.C. 5106(b).
[11] 5 U.S.C. 5107.
[12] 5 U.S.C. 5110(a).

Nothing in the Act or its legislative history suggests that resort to inter-agency comparisons is permissible, much less required as the Court of Claims held.

Prior to the Classification Act of 1923, federal positions were classified on the basis of comparisons of positions. It was precisely because the comparison system proved unsatisfactory that Congress adopted in that Act a classification system based on objective standards. See S. Rep. No. 486, 67th Cong., 2d Sess.; 61 Cong. Record 7722. The Court of Claims has, in effect, required the Commission to use a classification method which Congress rejected when it adopted the present Classification Act.

The "equal pay for equal work" principle in that Act (section 5101) was not intended to require classification by comparison of positions. That principle is a declaration of policy intended to guide the Commission in formulating objective standards. Congress intended that the principle be implemented by application of objective standards. The court of claims' creation of an exception to this statutory scheme where it is alleged that a relatively small group of lawyers perform the same duties (App. A, *infra,* p. 2a), finds no support in the statute or its legislative history.

The inappropriateness of comparisons as a method of classification is also dictated by practical considerations. The employing agency, which has the initial

classification responsibility, will not normally have access to the kind of detailed information necessary to make a comparison of positions in other agencies. While the Commission can obtain such information, the Commission's function is to review the agency's classification. If the agency is not required to compare positions in other agencies in classifying, the Commission is not required to do so in reviewing the agency's action.

To require inter-agency comparisons would impose substantial, and perhaps impossible, burdens upon the Commission. Since there is no basis for an assumption that the position to be compared is itself properly classified, the Commission would have to undertake a detailed investigation of the duties, responsibilities, and qualifications of the position as a condition precedent to review of the classification being appealed. Congress did not intend to impose such a burden on the Commission.

A federal employee is entitled to have his classification reviewed by the Commission under applicable standards, and that determination neither requires nor permits a comparison with the grade levels of positions in other agencies. Here the Commission found that respondents were properly classified at Grade GS–13. There was no reason to compare respondents' positions with the A.F.L.C. positions and the Court of Claims erred in ordering the Commission to do so.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General.
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Assistant to the Solicitor General.
LESLIE H. WIESENFELDER,
Attorney.

DECEMBER 1974.

APPENDIX A

In the United States Court of Claims

No. 128–72

(Decided July 19, 1974)

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI
v. THE UNITED STATES

Edwin J. McDermott, attorney of record, for plaintiff.
Leslie H. Wiesenfelder, with whom was *Assistant Attorney General Carla A. Hills*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, and BENNETT, *Judges*.

OPINION

PER CURIAM: This case is before the court on exceptions by both parties to a recommended decision and findings by Trial Judge Spector. Plaintiffs, civilian lawyers, were employed by the Defense Personnel Support Center, Defense Supply Agency (DPSC) at Philadelphia, Pennsylvania. The suit is for back pay from 1970 and an order for reclassification to operate *in futuro* under Pub. L. 92–415, 86 Stat. 652. We heard it *en banc* on plaintiffs' motion. The plaintiffs were classified at GS–13 and claim GS–14. They exhausted their remedies with the Civil Service Commission (CSC). The trial judge would hold that the refusal to reclassify at GS–14 was arbitrary and capricious but that the court cannot award the pay of a higher position to a person actually employed in a lower one. However, he would direct the CSC to reclassify for the future under Pub. L. 92–415.

We agree that the position of the CSC was arbitrary and capricious. Plaintiffs' case is built mainly on the classification of attorneys doing similar work for another agency. Plaintiffs try cases before the Armed Services Board of Contract Appeals (ASBCA). The comparison attorneys do so also, on behalf of the Air Force Logistics Command (AFLC) at Dayton, Ohio. The Commission flatly refused to consider them or their jobs. Ordinarily, we agree, it is not arbitrary and capricious to refuse to consider the grade of employees other than the ones complaining. This case is peculiar in its facts. Where, as here, employees all belong to a small readily manageable cadre, their jobs have a large nexus of duties shared in common, and the other employees are specifically pointed out by the complaining employees, we deem the case to be different. There may be a perfectly good explanation for the apparent discrepancy. We think as a reviewing court we are entitled to be informed by the CSC what it is, and not to have to take it on faith or speculate about it. Otherwise, we are in no position to assure ourselves that the mandate of the statute, 5 U.S.C. § 5101, (calling for equal pay for equal work), is being complied with. As the trial judge observes, the classification of lawyers is always difficult because of the spate of vague, subjective terminology in lawyer's job descriptions. We think, in the circumstances here involved, the grades of other lawyers representing other procuring agencies before the ASBCA provide an essential benchmark. Without consideration of them, or at least some of them, no confidence can be felt that the statute has been obeyed.

There is no iron rule that we cannot ever award the pay of a higher position to the incumbent of a lower one. We do that in *Selman* v. *United States*, 204 Ct. Cl. (decided June 19, 1974). *Compare, also, Jarrett* v. *United States*, 193 Ct. Cl. 320, 451 F. 2d 623 (1971). The question always is as to legal entitlement to the higher position. If entitlement depends on the exercise of discretion by someone else we cannot substitute our own discretion. *Allison* v. *United States*, 196 Ct. Cl. 263, 451 F. 2d 1035 (1971); *Pettit* v. *United States*, 203 Ct. Cl. 207, 488 F. 2d 1026 (1973). Here, as in *Pettit*, a remand under Pub. L. 92–415 affords the opportunity to employ the authority having the statutory discretion, to exercise

it under proper directions. In *Bookman* v. *United States*, 197 Ct. Cl. 108, 453 F. 2d 1263 (1972), we scrutinized the function of the CSC in classifying Government positions. We decided it was discretionary and not subject to our review except for arbitrary and capricious action or lack of support for a decision by substantial evidence. We adhere to that standard here. The theory of *Allison* and *Pettit*, however, was that the findings of the agency endowed with the discretion, if newly and correctly made, could create a legal right which we could then enforce by a money judgment. We did not consider our decisions therein to be merely declaratory, and neither is this one today.

It is unnecessary to construe the Back Pay Act, 5 U.S.C. § 5596, since, if it does not cover the situation here involved, neither does it limit the Tucker Act jurisdiction 28 U.S.C. § 1491, as it previously existed. It was so held in *Allison* and *Pettit*, *supra*. Defendant would in effect refuse any judicial review to a person perhaps denied equal pay for equal work in a job classification, in possible violation of 5 U.S.C. § 5101. When Congress desires to achieve this result, it knows how to do it. *See, Chambers* v. *United States*, 196 Ct. Cl. 186, 451 F. 2d 1045 (1971).

In accordance with the foregoing, we are constrained to differ with the trial judge both as to our supposed lack of power to award back pay and our supposed possession of power to direct the reclassification of the plaintiffs to Grade GS–14.

Accordingly, on considering the recommended decision and findings of Trial Judge Spector, and the exceptions of the parties thereto, and their briefs and oral arguments, it is

ORDERED, as follows: The case is remanded to the CSC pursuant to Pub. L. 92–415, 86 Stat. 652, and the court's General Order No. 3 of 1972 implementing such statute, for it to conduct further proceedings consistent with this order. In accordance with this court's General Order No. 3 of 1972, plaintiffs' attorney of record shall advise this court, by letter to the clerk, of the status of the remanded proceedings. Such advice shall be given at intervals of 90 days or less, commencing from the date of this order.

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SKELTON, *Judge*, dissenting:

This court does not have jurisdiction nor authority to remand this case to the Civil Service Commission.

The Supreme Court held in clear and unequivocal language in *United States* v. *King*, 395 U.S. 1 (1969), that this court can only render judgments for money presently due, and cannot render declaratory judgments. We have not rendered a judgment for money in the present case. Consequently, we have neither the authority nor jurisdiction to issue any other kind of judgment or order in the case, except one of dismissal. Public Law No. 92–415, 86 Stat. 652, now a part of 28 U.S.C. § 1491 (1972), known as the Remand Statute, did not change the law in this regard nor enlarge our jurisdiction, except "*to complete the relief afforded by the judgment* [for money presently due], the court may, *as an incident of and collateral to any such judgment*, * * * *in any case within its jurisdiction* * * * remand appropriate matters to any administrative or executive body * * *." (Emphasis supplied.) Since there is no money judgment here, which is the only kind this court can enter, there is no relief in the judgment to be completed, and there is nothing that the remand order can be "an incident of and collateral to." Also, the court is acting in a case not "within its jurisdiction." Consequently, the Remand Statute is inapplicable to this case. See *Kirby* v. *United States*, 201 Ct. Cl. 527, 537 (1973), *cert. denied*, —— U.S. —— (1974). Therefore, the remand order is an exercise by the court of general equity powers which it does not possess, and is in the nature of a declaratory judgment as to the rights of the plaintiffs, which this court has no power to issue. *See United States* v. *King*, *supra*.

In addition to being without jurisdiction or authority to issue the remand order, as pointed out above, the court is also without jurisdiction to consider any part of plaintiffs' suit, because they have not alleged a claim upon which relief can be granted by this court. This is true because the plaintiffs are asking this court to promote them to higher positions and award them the salaries incident thereto, even though they have never been appointed to those positions by the agency for whom they work. Such relief is wholly beyond the jurisdiction of this court. This problem and the law relating to it was thoroughly discussed in my dissenting opinions in

Chambers v. *United States*, 196 Ct. Cl. 186, 451 F. 2d 1045 (1971); *Allison* v. *United States*, 196 Ct. Cl. 263, 451 F. 2d 1035 (1971); and *Pettit* v. *United States*, 203 Ct. Cl. 207, 488 F. 2d 1026 (1973), and I incorporate those dissenting opinions herein and, where applicable, make them a part of this dissenting opinion by reference. My dissent in the *Allison* case is especially applicable to the instant case, and, for emphasis, I repeat certain pertinent portions of that dissent in the following paragraphs, which I apply to the case before us.

This court does not have jurisdiction of this case for many reasons. The plaintiffs have not alleged a cause of action on which relief can be granted. They are asserting claims for salaries of jobs, but their petition does not allege that they were ever appointed to those jobs, nor that they performed services therein. Without these essential allegations, the petition does not state a cause of action. We have so held in the cases of *Price* v. *United States*, 65 Ct. Cl. 91 (1928), *cert. denied*, 277 U.S. 587; *Barea* v. *United States*, 115 Ct. Cl. 44 (1949); and *Hyman* v. *United States*, 138 Ct. Cl. 836, 157 F. Supp. 164 (1957).

The failure of the department to promote the plaintiffs, whatever the cause, did not give them a cause of action against the United States, because they had no constitutional, vested, or inherent right to the jobs they are claiming. This is unquestionably the law. *See McAuliffe* v. *New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892); *Jenson* v. *Olson*, 353 F. 2d 825 (8th Cir. 1965); and *Bailey* v. *Richardson*, 182 F. 2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

Article 2, Section 2 of the Constitution provides that officers of the United States shall be appointed by the President or the heads of the departments, as Congress may direct. There is no other way a person can obtain a government job. *See United States* v. *Smith*, 124 U.S. 525 (1888); *United States* v. *Mouat*, 124 U.S. 303 (1888); and *Thomason* v. *United States*, 85 F. Supp. 742 (N.D. Cal. 1948), *aff'd*, 184 F. 2d 105 (9th Cir 1950). Government employment is not a contract, is not property and the due process clause of the Constitution does not apply. *Bailey* v. *Richardson*, *supra*; *Crenshaw* v. *United States*, 134 U.S. 99 (1890); *Taylor* v. *Beckham*, 178 U.S. 548 (1900); and *Jenson* v. *Olson*, *supra*.

Since the plaintiffs were never appointed to these jobs, they had no vested or property rights in them. Consequently when they were not promoted, they were not denied anything that they had a right to.

It is fundamental that the salary of a government job is incident to and attaches to the job. In other words, it is a part of the job and goes with it. Because of this principle, the salary is payable only to the person appointed to the job, and a government employee is entitled only to the salary of the position to which he has been appointed. *See Borak* v. *United States*, 110 Ct. Cl. 236, 78 F. Supp. 123 (1948), *cert denied*, 335 U.S. 821; *Price* v. *United States*, 112 Ct. Cl. 198, 80 F. Supp. 542 (1948); *Ganse* v. *United States*, 180 Ct. Cl. 183, 376 F. 2d 900 (1967); *United States* v. *McLean*, 95 U.S. 750 (1877); *Amundson* v. *United States*, 128 Ct. Cl. 80, 120 F. Supp. 201 (1954); and *Dvorkin* v. *United States*, 101 Ct. Cl. 296, *cert denied*, 323 U.S. 730 (1944). A corollary principle is that where an employee has received the salary of the office to which he was appointed, he has received all that he was entitled to. *Price* v. *United States*, *supra; Ganse* v. *United States*, *supra*. It follows from these authorities that the only way the plaintiffs could get the salaries of the jobs they are claiming was to be appointed to these positions, which did not happen. Also, when they received the salaries of the jobs to which they had actually been appointed, they had received all they were entitled to. These principles were applied in the above cited cases and in *Donnelly* v. *United States*, 133 Ct. Cl. 120, 134 F. Supp. 635 (1955); and *Tierney* v. *United States*, 168 Ct. Cl. 77 (1964), which were "promotion" cases. *Amundson* v. *United States*, *supra*, was also a promotion case.

It is clear that since the plaintiffs have not alleged nor shown that they have met the requirements set forth in the above authorities, they have not alleged a cause of action and this court does not have jurisdiction of their case.

As pointed out above, Article 2, Section 2 of the Constitution places the appointing power in the heads of the department, if directed by Congress. Such power has been given to the head of the department here. This court has no authority to take over that function. The Supreme Court and all other courts have always held that the appointment of government employees is an executive agency function that involves discretion and it will not be interferred with by the courts. *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839); *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497 (1840); *United States* v. *McLean*, 95 U.S. 750 (1877); *Keim* v. *United States*, 177 U.S. 290 (1900); *Donnelly* v. *United States*, *supra; Tierney* v. *United States*, *supra;* and *Amundson* v. *United States*, *supra*.

During the more than 100 years this court has been in existence we have never promoted any government employee. Our jurisdiction has always been and still is limited to the granting of money judgments. *United States* v. *King*, 395 U.S. 1 (1969). This principle was expressed very well by Judge Laramore in speaking for the court in *Umbeck* v. *United States*, 149 Ct. Cl. 418 (1960), when he said:

> * * * Furthermore, it is the function of the agency rather than the court to make promotions, and to allow plaintiff to recover on this theory would be in effect granting a promotion to plaintiff. It is well settled that this court's jurisdiction extends only to the granting of a monetary judgment. *United States* v. *Jones*, 131 U.S. 1; *United States* v. *Alire*, 6 Wall. 573; *Hart* v. *United States*, 91 Ct. Cl. 308. [*Id.* at 429.]

Again in *Bortin* v. *United States*, 133 Ct. Cl. 856, 138 F. Supp. 251 (1956), we said:

> Nor did plaintiff have any right to complain because, later on, an adjudicator other than he was promoted to assistant adjudication officer. It is still true, fortunately, that "promotion is the prerogative of an agency so long as the employee promoted meets the requirements for the position to which promoted." It would be quite detrimental to the public service if an agency head had no discretion in selecting men to do important jobs. He is already circumscribed more than a little in his control over his subordinates. [*Id.* at 860, 138 F. Supp. at 253.]

The appointment of the plaintiffs to these jobs retroactively by the court would be the exercise of equitable powers this court does not possess. *United States* v. *King*, *supra*.

The majority opinion in its present posture is actually a declaratory judgment. This is so because the plaintiffs' claims are not "limited to actual presently due damages from the United States," which the Supreme Court said in *United States* v. *King*, *supra*, was necessary in order to give this

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court jurisdiction. Otherwise, a declaration of the right of a claimant is a declaratory judgment. Here no court having appropriate powers has held that the plaintiffs are entitled to any money, nor has declared their rights to any amount of damages. We have no jurisdiction to entertain their claims or to declare their rights.

Finally, in the instant case, the record shows that the decision of the Commission was neither arbitrary nor capricious and was supported by substantial evidence. Furthermore, there is a rule of long standing that in discretionary matters, such as those involved here, the officers of the government are presumed to have discharged their duties in good faith and in a legal and proper manner. It takes wellnigh "irrefragable proof" to overcome this presumption. No such proof exists in the present case. *United States* v. *Chemical Foundation, Inc.* 272 U.S. 1, 14 (1926); *Grover* v. *United States*, 200 Ct. Cl. 337 (1973); *Kozak* v. *United States*, 198 Ct. Cl. 31, 35, 458 F. 2d 39, 40 (1972); and *Knotts* v. *United States*, 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631–32 (1954).

I would enter judgment for the defendant and dismiss the plaintiffs' suit.

LARAMORE, *Senior Judge*, and BENNETT, *Judge*, join in the foregoing dissenting opinion.

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APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 128-72

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, Senior Judge, DAVIS, SKELTON, NICHOLS, KASHIWA and BENNETT, Judges

---

O R D E R

This case comes before the court on plaintiffs' motion to amend the court's order of July 19, 1974, so as to fix a period of not to exceed six (6) months during which the court proceedings shall be stayed pending further administrative proceedings. Upon consideration of plaintiffs' motion and defendant's response thereto,

IT IS ORDERED that the court's order of July 19, 1974, is hereby amended as follows:

> This case is remanded to the Civil Service Commission pursuant to Pub. L. 92-415, 86 Stat. 652 and Rule 149(b) for a period of not to exceed six (6) months from the date of this order to conduct further administrative proceedings consistent with the court's per curiam opinion and decision of July 19, 1974. Further proceedings in the court shall be stayed during the period fixed by this order of remand. Plaintiffs' counsel is designated to advise the court by letter to the clerk of the status of the remand proceedings, and such advice shall be given at intervals of 90 days or less, commencing from the date of this order.

NOV - 1 1974

BY THE COURT

Chief Judge

(9a)

U.S. GOVERNMENT PRINTING OFFICE : 1974 O—585-454

Supreme Court, U. S.
FILED
MAY 2 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-753

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR A WRIT OF CERTIORARI FILED DECEMBER 16, 1974
CERTIORARI ALLOWED FEBRUARY 18, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-753

UNITED STATES OF AMERICA,

Petitioner,

—v.—

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE UNITED STATES COURT OF CLAIMS

No. 128-72

DOCKET ENTRIES

DATE	PROCEEDINGS
Mar 28 1972	Filing fee of $11 paid by plaintiffs.
Apr 6 1972	See 102-72 for order referring case to Commissioner Louis Spector.
May 30 1972	Defendant's answer to the petition filed. Copies (13) to atty.
Jun 27 1972	Commissioner's memorandum of pretrial conference together with plaintiffs exhibits 1 thru 5 and defendant's exhibits 1 thru 3 filed. Copy to parties.
Aug 2 1972	Plaintiffs' motion for call upon the Secretary of the Air Force filed. Copies (3) to deft. ALLOWED SEP 7 1972 and issued. (SEE COURT'S ORDER OF OCT 16 1972).
Aug 7 1972	Defendant's motion for extension of time (to August 25, 1972) to reply to motion for call filed. Copies (2) to atty. ALLOWED AUG 23 1972.
Aug 25 1972	Defendant's motion for extension of time (to August 30, 1972) to file response to motion for call filed. Copies (2) to atty. ALLOWED AUG 30 1972.
Aug 30 1972	Defendant's response to plaintiffs' motion for call filed. Copies (2) to atty.
Sep 6 1972	Plaintiffs' reply to response to motion for call filed. Copies (4) to deft.
Sep 15 1972	Defendant's request for review of the commissioner's order of September 7, 1972, filed. Copies (2) to atty. (SEE COURT'S ORDER OF OCT 16 1972).

DATE	PROCEEDINGS
Sep 28 1972	Plaintiffs' motion for leave to file opposition, with affidavit, to defendant's request for review of the commissioner's order of September 7, 1972, filed. Copies (2) to deft. ALLOWED SEP 29 1972.
Sep 29 1972	Plaintiffs' opposition to defendant's request for review of the commissioner's order, etc. filed. Copies (2) to deft.
Oct 16 1972	Court filed order allowing defendant's request for review, and that the trial commissioner's order of September 7, 1972, is vacated and plaintiff's motion for call is denied. Copy to parties.
Nov 28 1972	Commissioner's order closing proof, etc. filed. Copy to parties.
Dec 26 1972	Plaintiffs' motion for extension of time (to February 1, 1973) to file requested findings, etc. filed. Copies (2) to deft. ALLOWED JAN 9 1973
Jan 22 1973	Plaintiffs' requested findings of fact and brief filed. Copies (2) to deft.
Feb 21 1973	Defendant's motion for extension of time (to April 2, 1973) to file requested findings, etc. filed. Copies (2) to atty.
	ALLOWED MAR 9 1973.
Apr 2 1973	Defendant's requested findings of fact, etc. filed. Copies (2) to atty.
Apr 27 1973	Plaintiffs' objections to defendant's requested findings, etc. filed. Copies (2) to deft.
Sep 14 1973	Trial judge's opinion and findings of fact filed. Copies to parties.
Oct 15 1973	Defendant's notice of intention to except to the trial judge's opinion filed. Copies (2) to atty.

DATE	PROCEEDINGS
Oct 24 1973	Defendant't motion for extension of time (to December 13, 1973) to file its brief and exceptions filed. Copies (2) to atty.
	ALLOWED NOV 2 1973 with no further extension to be granted except for extraordinary circumstances.
Oct 30 1973	Plaintiffs' objection to motion for time extension filed. Copies (2) to deft.
Oct 31 1973	Defendant's reply to objection to motion for time extension filed. Copies (2) to atty.
Dec 13 1973	Defendant's brief and exceptions filed. Copies (13) to atty.
Dec 20 1973	Plaintiff's motion for leave to file notice of intention to except out of time filed. Copies (2) to deft.
	ALLOWED JAN 18 1974, see endorsement on motion.
Jan 2 1974	Defendant's response to motion of December 20, 1973 filed. Copies (2) to atty.
Jan 14 1974	Plaintiffs' reply to response of January 2, 1974, filed. Copies (2) to deft.
Jan 14 1974	Plaintiffs' motion for extension of time (to February 16, 1974) to file exception and brief filed. Copies (2) to deft.
	ALLOWED JAN 25 1974.
Jan 18 1974	Plaintiffs' notice of intention to except filed. Copies (2) to deft.
Feb 13 1974	Plaintiffs' brief and exception to the trial judge's opinion filed. Copies (13) to deft.
Mar 4 1974	Defendant's motion for extension of time (to April 4, 1974) to file reply brief filed. Copies (2) to atty. ALLOWED MAR 20 1974.

DATE	PROCEEDINGS
Apr 4 1974	Defendant's reply brief filed. Copies (13) to atty.
May 28 1974	Court entered order that this case will be heard by the court en banc on the June 1974 calendar. Copy to parties.
Jun 6 1974	Argued and submitted on the merits. Copies of referred to dictionary to be supplied by plaintiffs.
Jul 19 1974	The case is remanded to the Civil Service Commission for the conducting of further proceedings consistent with the order of remand. Opinion Per Curiam. Dissenting Opinion by Judge Skelton in which Senior Judge Laramore and Judge Bennet join.
Oct 3 1974	Plaintiffs' motion to file out of time motion under Rule 151 to amend the judgment filed [motion for leave is the motion to amend the judgement]. Copies (2) to deft.
Oct 10 1974	Defendant's response to motion for leave to file out of time filed. Copies (2) to atty.
Oct 18 1974	Plaintiffs' reply to response to motion for leave to file out of time filed. Copies (2) to deft.
Nov 1 1974	Court entered order amending the court's order of July 19, 1974, as set forth in the order. Copy to parties.
Dec 19 1974	Notice of filing by Defendant in Supreme Court of a petition for writ of certiorari filed. (Date: Dec. 16, 1974; No. 74-753).
Dec 26 1974	Defendant's motion for extension of time (45 days after the U.S. Supreme Court rules) to comply with order of remand filed. Copies (2) to atty. ALLOWED JAN 14 1975.
Feb 24 1975	Order of the Supreme Court, dated February 18, 1975, granting the petition for a writ of certiorari filed.

IN THE UNITED STATES COURT OF CLAIMS

No. 128-72

[Filed March 28, 1972, Court of Claims]

HERMAN R. TESTAN,
2301 Shelmire Avenue, Philadelphia, Pa. 19152,

FRANCIS L. ZARRILLI,
2729 Kent Road, Broomall, Pa. 19008, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

PETITION

1. On and before May 8, 1970 the plaintiffs were employed by defendant under the Classified Civil Service as Trial Attorneys, classified at Grade GS-905-13 in the Office of Counsel, Defense Personnel Support Center, Defense Supply Agency, Philadelphia, Pa.

2. The Position Description assigned to the Trial Attorney position GS-905-13 was as follows:

"JOB SUMMARY

"Serves as Trial Attorney in connection with appeals before the Armed Services Board of Contract Appeals (ASBCA) of the Department of Defense which arise under the contracts at DPSC. Appeals to the ASBCA are from Contracting Officers' decisions involving disputes arising as a result of claims by the contractor or the Government in connection with performance or termination of contracts, as, for example, additional costs incurred by the contractor in being furnished defective Government material; additional costs incurred by delays resulting in stoppage or slowdown of production; additional costs or savings involved in defects in or changes of specifications; controversial interpreta-

tions of contract provisions; termination of contracts for the convenience of the Government; excusability of delays giving rise to termination of contracts for default; etc. Utilizes a specialized knowledge of Government contract law in performance of job.

"JOB CONTROLS

"Receives general supervision from Chief Trial Attorney which includes assignment of cases, discussion, conferences and information as to new or revised policies, discussion of unusual and complex problems; incumbent functions independently during progress of assignment with full technical responsibility and wide latitude of discretion. Review is made of contemplated actions as required for adherence to established policy and/or need for additional legal theory.

"MAJOR DUTIES

"1. *Prepares appeal action for trial and presents before the Armed Services Board of Contract Appeals*: Assembles and analyzes complete claims files which are involved in actions brought by or against the Government (Contract, GFP, Inspection, Laboratory, Fiscal); studies the files and defines factual and legal issues. Prepares a complete statement of all the facts in the case, including those which require further development, a statement of any difficulties encountered during administration of the contract, showing how disputes arose and were resolved, and prepares physical exhibits to substantiate the stand taken. Investigates the facts. Selects, interviews and prepares prospective witnesses, including expert witnesses for examination and cross-examination at trial; prepares statements and affidavits. Points up those facts which are most advantageous to the Government and the legal arguments which are best supported by precedent decisions, when available. Researches law; prepares and files Answer to Complaint or memorandum in Lieu of Answer, determin-

ing what issues should be controverted, admitted, etc. Prepares and argues all applicable motions and presents evidence in connection therewith. Prepares Trial Memorandum, opening and closing statements, citations of law and relevant documents for orderly presentation of Government's case. Forwards a copy of each Notice of Appeal, Complaint, Answer, Rule Memorandum (without inclosures), Brief, and ten days prior to date set for hearing, Trial Memorandum containing a summary of the testimony of proposed witnesses to the Counsel, DSA. Amends Answer when deemed necessary or when required by the Board. Participates in pre-hearing conferences before the Board and/or pre-hearing meetings with appellant's attorney to consider simplification of the issues, desirability of amendments of the pleadings, possibility of obtaining admissions of fact and stipulation as to admission into evidence of documents which will avoid unnecessary proof, limitation of the number of expert witnesses and such other matters as may aid in disposition of the appeal or shortening the time and expense of the trial. When deemed appropriate, incumbent may move the Board for permission to serve Written Interrogatories or take Oral Depositions. Arranges with the Board, appellants and/or their attorneys for time and place of trial. Determines, when in the best interests of the Government, that a particular case should be settled and negotiates terms of the settlement, with the discussion and advice of the Chief Trial Attorney. Conducts actual trial of the case, cross-examines appellants' witnesses, when advisable, interposes objections to appellant's offer of proof when appropriate, stipulates as to facts, offers such relevant evidence as deemed advisable and admissible under the generally accepted rules of evidence applied in the Courts of the United States in non-jury trials. Studies the transcript and all exhibits; after conclusion of the trial prepares post-trial briefs and reply or rebuttal briefs when appropriate.

"2. *Reviews ASBCA decisions and takes necessary action as determined advisable*: Reviews all decisions of ASBCA on appeals handled. Files a Motion for Reconsideration with ASBCA based upon determination that decision is erroneous in whole or in part after consultation with Chief Trial Attorney. If ASBCA denies the Motion or sustains its previous decision and a decision by the Comptroller General (GAO) is desired prior to payment forwards request for such a decision to the Counsel, DSA. Maintains direct contact with the ASBCA, appellants and/or their attorneys, other Governmental agencies, witnesses, etc. in all matters involving assigned appeals.

"Performs other duties as assigned."

Counsel for the Defense Personnel Support Center has stated that:

". . . The assignment of cases [as between the Chief Trial Attorney and the plaintiffs, Trial Attorneys] is accomplished on a random basis depending solely on the workload of the 3 members of the trial section at the time of assignment. Once a case is assigned, the particular attorney assumes complete and sole responsibility therefor, using independent judgment in development of the theory of the case, selection of witnesses, use of trial tactics and strategy, preparation of all pleadings, motions, briefs, correspondence, etc., until a final decision is rendered by the Armed Services Board of Contract Appeals; or, if warranted by applicable facts and law in the sole judgment of the assigned attorney, the case may be settled before, during or after trial."

3. General Attorney Series GS-905-0, issued by the United States Civil Service Commission, provided an Evaluation Plan which set forth as main categories or factors: (1) *nature of the case or legal problem* and (2) *level of responsibility*. Plaintiffs' duties, according to the provisions of said General Attorney Series GS-905-0, are properly evaluated as falling within Type III under the

factor: *nature of the case or legal problem*, and Level D under the factor: *level of responsibility*, and were thereunder entitled to Grade GS-905-14, as Trial Attorney (Contract).

4. Plaintiffs pursued the administrative remedy open to them by duly requesting that their positions be properly reclassified as Trial Attorneys at Grade GS-905-14 by the Office of Civilian Personnel, Defense Personnel Support Center, which was refused May 8, 1970; by the Director, Philadelphia Region, United States Civil Service Commission, which was refused July 20, 1970, and on reconsideration refused November 13, 1970; by the Classification Appeals Office, Bureau of Personnel Management Evaluation, United States Civil Service Commission, which was refused February 23, 1971; and by the Commissioners of the United States Civil Service Commission, which was refused July 14, 1971.

5. The aforesaid action of such Office of Civilian Personnel, and of such United States Civil Service Commission, was contrary to the provisions of General Attorney Series GS-905-0, was arbitrary and capricious and opposed to and not supported by substantial evidence.

6. On June 22, 1970, Wright-Patterson Air Force Base, Ohio, issued Announcement No. L-3 (1970) for Trial Attorney (Contract), GS-905-14 $19,643 per annum) furnishing Description of Work as follows:

The primary function of the incumbent is to prepare and try appeals involving contract disputes before the Armed Services Board of Contract Appeals. The duties of this position include: (1) Examining, reviewing and studying all correspondence, contractual documents, and other pertinent documentary evidence as well as reviewing all applicable laws, regulations and directives; (2) preparing legal opinions, all necessary written pleadings including Answers, Motions, Briefs and such other legal papers as required in each case; (3) interviewing and corresponding with witnesses including official or technical experts; (4) arranging and taking of depositions of witnesses with opposing counsel, including prepara-

tion of Interrogatories and Cross-interrogatories to be propounded to such witnesses; (5) arranging for hearing dates with opposing counsel and for the presence of all Government witnesses at such hearings; (6) planning and developing trial techniques, legal tactics and procedures to be used in the trial of each assigned case; (7) examination and cross-examination of witness and introduction of evidence during the course of adversary proceedings; (8) participating in negotiations and settlement of cases.

7. The duties and responsibilities of plaintiffs are identical to the duties and responsibilities of the Trial Attorneys of the Contract Appeals Division of the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, who have been classified by the United States Civil Service Commission under General Attorney Series GS-905-0, at Grade GS-905-14. Both Trial Attorney positions call for identical practice before the Armed Services Board of Contract Appeals.

8. On September 16, 1971 plaintiffs brought action in the United States District Court for the Eastern District of Pennsylvania against the Members of the United States Civil Service Commission; the Secretary of Defense; the Commanding Officer and the Director, Office of Civilian Personnel, Defense Personnel Support Center; and against The United States; seeking declaratory judgment, mandamus, and money judgment. On March 21, 1972 such action was discontinued by plaintiffs, without prejudice, upon the consent of the United States Attorney and approval of the United States District Court for the Eastern District of Pennsylvania.

9. Plaintiff Herman R. Testan, presently classified GS-905-13-7, would, on reclassification as GS-14, be entitled to be reclassified as GS-905-14-4. Plaintiff Francis L. Zarrilli, presently classified GS-905-13-6, would, on reclassification as GS-14, be entitled to be reclassified as GS-905-14-3.

10. Plaintiff Herman R. Testan is entitled to recover from defendant the difference between his salary as Trial

Attorney (Contract) GS-905-13-7 and GS-905-14-4 since May 8, 1970. Plaintiff Francis L. Zarrilli is entitled to recover from defendant the difference between his salary as Trial Attorney (Contract) GS-905-13-6 and GS-905-14-3 since May 8, 1970.

Wherefore, each plaintiff claims of defendant the sum due him to date of judgment, and such other relief as your Honorable Court may deem just and equitable.

Respectfully submitted,

/s/ Edwin J. McDermott
EDWIN J. MCDERMOTT
Attorney for Plaintiffs
2425 Fidelity Building
123 S. Broad Street
Philadelphia, Pa. 19109

IN THE UNITED STATES COURT OF APPEALS

No. 128-72

[Filed May 30, 1972, Court of Claims]

HERMAN R. TESTAN and FRANCIS L. ZARRILLI,
PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

DEFENDANT'S ANSWER

Defendant, for its answer to the petition filed herein:

1 to 2, inclusive. Admits the allegations contained in paragraphs 1 to 2, inclusive, of the petition.

By way of further answer, defendant alleges that the Position Description referred to in paragraph 2 of the petition speaks for itself and is the best evidence of its contents.

3. Admits the allegations contained in the first sentence of paragraph 3 of the petition.

Admits that plaintiffs' duties, according to the provisions of said General Attorney Series GS-905-0, are properly evaluated as falling within Level D under the factor: *level of responsibility;* but otherwise denies the allegations contained in the second sentence of paragraph 3 of the petition.

4. Admits the allegations contained in paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition.

6. Admits the allegations contained in paragraph 6 of the petition.

By way of further answer, defendant alleges that Job Announcement No. L-3 speaks for itself and is the best evidence of its contents.

7. Denies the allegations contained in paragraph 7 of the petition.

8. Admits the allegations contained in paragraph 8 of the petition.

9. The allegations contained in paragraph 9 of the petition constitute conclusions of law to which defendant is not required to answer, but to the extent that they may be deemed to be allegations of material fact, they are denied.

10. Denies the allegations contained in paragraph 10 of the petition.

11. Defendant specifically denies that plaintiffs are entitled to recover judgments against defendant in any amounts.

12. Except as herein admitted, denied or qualified, denies all allegations of material fact contained in the petition.

WHEREFORE, defendant prays that plaintiffs' petition be dismissed, and that defendant be granted such other and further relief as may be just and proper.

/s/ Harlington Wood, Jr.
HARLINGTON WOOD, JR.
Acting Assistant
Attorney General
Civil Division

/s/ LeRoy Southmayd, Jr.
LEROY SOUTHMAYD, JR.
Attorney, Civil Division
Department of Justice.

GENERAL ATTORNEY SERIES

[Filed June 27, 1972, Court of Claims]

This series includes professional legal positions involved in preparing cases for trial and/or the trial of cases before a court or an administrative body or persons having quasi-judicial power; rendering legal advice and services with respect to questions, regulations, practices, or other matters falling within the purview of a Gederal Government agency (this may include conducting investigations to obtain evidentiary data); preparing interpretative and administrative orders, rules, or regulations to give effect to the provisions of governing status or other requirements of law; drafting, negotiating, or examining contracts or other legal documents required by the agency's activities; drafting, preparing formal comments, or otherwise making substantive recommendations with respect to proposed legislation; editing and preparing for publication statutes enacted by Congress and opinions or decisions of a court, commission, or board; and drafting and reviewing decisions for consideration and adoption by agency officials. Included also are positions, not covered by the Administrative Procedure Act, involved in hearing cases arising under contracts or under the regulations of a Federal Government agency when such regulations have the effect of law, and rendering decisions or making recommendations for disposition of such cases. The work of this series requires admission of the bar.

The following series and any standards published for these series are canceled and superseded by this standard:

(1) Trial Attorney Series, GS-910-0
(2) Attorney Trial-Examining Series, GS-940-0
(3) Naturalization Examiner Series, GS-943-0
(4) Judicial Series, GS-944-0
(5) Legal Administration Series, GS-950-0
(6) Attorney-Adviser Series, GS-970-0
(7) Legislative Attorney Series, GS-975-0

(8) Attorney-Editor Series, GS-980-0
(9) General Attorney Series, GS-985-0
(10) Trade-Mark Trial and Appeal Series, GS-1242-0

TITLES

Attorneys tend to specialize in two respects. They may specialize as to the function they perform and the subject-matter area in which they work.

Titles are provided below which apply to the various functional and subject-matter specializations. The title of an attorney position is constructed by using the appropriate functional designation such as "Attorney-Adviser," followed by the appropriate subject-matter designation such as "(Contract)"—thus the complete title would be Attorney-Adviser (Contract).

There is one exception to the foregoing titling procedure which applies to positions classified in grade GS-9. At these lower grades specialization is usually relatively insignificant. The attorney is learning the procedures and policies of his organization. Not until he reaches the GS-11 level are his specialized knowledges and skills significant enough to be recognized in the title of his position. Accordingly, positions classified in GS-9 are titled "General Attorney" with no further designation.

Functional titles:

1. *Trial Attorney* for positions involved in the preparation for trial and/or the trial of cases, or for positions involved in providing technical guidance to persons preparing for or trying cases before a court or an administrative body or person having quasi-judicial power.

2. *Attorney-Adviser* for positions involved in rendering legal advice and services with respect to questions, regulations, practices, or other matters falling within the purview of a Federal Government agency (this may include conducting investigation to obtain evidentiary data and recommending an agency course of action); preparing interpretative and administrative orders, rules, or regulations to give effect to the provisions of governing

statutes or other requirements of law; drafting, negotiating, or examining contracts or other legal documents required by the agency's activities; drafting, preparing formal comments, or otherwise making substantive recommendations with respect to proposed legislation; editing and preparing for publication statutes enacted by Congress and opinions or decisions of a court, commission, or board; drafting and reviewing decisions for consideration and adoption by agency officials.

3. *Attorney-Examiner* for positions, not covered by the Administrative Procedure Act, involved in hearing cases arising under contract or under the regulations of a Federal Government agency when such regulations have the effect of law, and rendering decisions or making recommendations for disposition of such cases.

4. *General Attorney* for positions involving two or more of the above functional areas *or* for positions, regardless of functional or subject-matter area of work, classifiable at GS-9.

Subject-matter titles:

1. *(Admiralty).* Martitime law and matters related thereto.

2. *(Aeronautics).* Law pertaining to the operation of aircraft and related matters.

3. *(Antitrust).* Pertaining to antitrust and kindred law and protection of the competitive enterprise system.

4. *(Civil Rights).* Pertaining to law employed to protect federally secured civil rights and liberties of persons. Also pertaining to law concerning the conduct of elections and to labor practices which have relationship to the civil rights of individuals.

5. *(Contract).* The preparation, negotiation, review, and advisory work pertaining to contracts, agreements, bonds, notes, and other legal instruments.

6. *(Customs).* Pertaining to customs law and related matters.

7. *(Finance).* Corporation finance matters dealing with securities, reorganizations, recapitalizations, mergers, and other related activities or municipal finance mat-

ters involving municipal securities, tax levies, mortgage financing, loans and guarantees to municipalities or local public agencies.

8. *(General).* For areas of law not covered by other subject-matter titles or when two or more areas of law are involved.* Where this designation would appropriately be used with the functional title *General Attorney*, the subject-matter title *(General) may be omitted* to avoid the awkward combination—General Attorney (General).*

9. *(Immigration).* Pertaining to law concerned with the admission of aliens to, and their status in, the United States, as well as their exclusion or deportation from the United States.

10. *(Indian Matters).* Pertaining to Indian tribal claims and related matters.

11. *(International.)* Pertaining to law, agreements, treaties, conferences, and related matters of an international nature.

12. *(Labor).* Pertaining to Federal labor law and related matters.

13. *(Mail).* Pertaining to mail law involving mailability, fraud, claims, and other related matters.

14. *(Military).* Pertaining to military law and practice and to statutes and regulations concerning military personnel, including pay, allowances, appointments, promotions, separations, retirement, punishments, and other related matters.

15. *(Nationality).* Pertaining to law concerned with allegiance to a government and entitlement to protection from that government, and including such matters as reparations, naturalization, and citizenship.

16. *(Public Utilities).* Pertaining to law and regulations concerning the Government as an owner, consumer, or regulator of public utilities.

These pages are to be substituted for pages 3 and 4 of the position classification standards for the GS-905 series, issued in October, 1959. The purpose of the substitution is to permit the omission of the subject-matter title "(General)" where it occurs in combination with the functional title "General Attorney."

17. *(Real Property).* Pertaining to title searches and other professional legal work in connection with all forms of real property (including natural resources) acquisition, use, or disposal.

18. *(Tax).* Pertaining to Federal tax law and related matters.

19. *(Trade-Mark).* Pertaining to the adjudication of trade-mark appeals.

20. *(Trade Regulations).* Pertaining to law prescribing unfair and deceptive acts and practices in interstate commerce, unfair methods of competition, and other monopolistic and trade restraining practices.

21. *(Transportation).* Pertaining to finance, rates, practices, operating rights, and other matters concerning motor, sail, water, or air carriers, freight forwarders, pipelines, or brokers of transportation.

22. *(Veterans).* Pertaining to law concerning veterans' rights and benefits and related matters.

Two other parenthetical titles which may be used when the qualification requirements of a position are significant enough to require their use are: (1) (Legislation) and (2) (Editor). These titles may be used in conjunction with any of the above subject-matter titles when necessary, e.g., (Tax-Legislation) or (Tax-Editor).

EVALUATION PLAN FOR NONSUPERVISORY GENERAL ATTORNEY POSITIONS

There are a number of elements which together determine the difficulty and responsibility of attorney positions. These elements fall into two main categories (or factors): (1) *nature of the case or legal problem* and (2) *level of responsibility.* While there is some relationship between these two factors, each one is measured separately to recognize the fact that they do not necessarily appear in attorney positions in proportionate degrees. For example, an attorney may be involved in a high-level legal case or problem, but his degree of responsibility may be limited. Conversely an attorney may be involved in a relatively routine legal case or problem, but he may be operating with a high degree of responsibility.

The level assigned to one factor together with the level assigned to the other factor will determine the grade of the position according to the conversion table at the end of the standard.

• • • •

(1) *Nature of the case or legal problem.* This factor incorporates all those elements in a case or a problem which tend to make it more or less difficult to resolve satisfactorily. These elements measure the inherent difficulty of the legal and factual questions involved in a case or problem, as distinguished from the nature or extent of the individual's responsibilities for resolving the problem, the supervision he receives, extent of significant personal contacts, or any other performance element.

Among the elements are such things as the *complexity of legal and factual issues.* This element is obviously a key one, i.e., the more complex the legal or factual issues —the more difficult the resolution of the case. A by-product of a complex legal or factual issue is often the negotiation and preparation of a complex contract or other legal document.

The *impact of the case or problem* (in economic, social, or political terms) on the public, on relations with State or local governments, on national defense, on foreign relations, on private interests, or on agency authority, operations, procedures, or practices, is also an important consideration in evaluating the nature of the case or legal problem. When a legal matter materially affects any of the foregoing the consequences of the legal advice or decision may be far reaching and the damage which can be inflicted on the parties concerned or on the Government's prestige is often irreparable.

The *importance of the case or legal action as legal or administrative precedent* is very significant. In the vast area of administrative law, agency actions cumulatively reflect policies and trends. When a precedent-setting situation arises it can easily undo something which has taken years to attain. Often a relatively uncomplicated situation can become a test case of extreme importance

to a Government agency or non-Government interested groups. Precedent-making cases or actions make for responsible legal endeavor whether or not large amounts of money or complex legal or factual issues are involved. To measure the significance of a precedent case or action it is necessary to consider it in relation to the significance of its consequences. Consideration of the precedent in terms of the element, *impact of the case or problem* (in economic, social, or political terms), is required.

The *nature of the competition* encountered may be significant. Just as in an athletic event, the tougher the competition—the tougher the contest. Usually, tough competition is an indication that something important is at stake—whether it be money, a precedent in the making, or some other important consideration.

The *nature and availability of precedent decisions* is another important constituent of the factor, *nature of the case or legal problem.* If precedents are clear cut and plentiful, the attorney's job is ordinarily relatively simple. When precedents are few or conflicting, his job is more difficult.

Occasionally the *delicateness of the problem* becomes an all-important consideration in evaluating the nature of the case or legal problem. What might ordinarily be an uncomplicated legal or factual situation, with no foreseeable precedent-setting value, may develop into a very delicate matter which could possibly embarrass public officials or the government in the eyes of officials of a foreign government.

Public interest in a particular legal matter has an effect on the nature of the case or legal problem as does the delicateness element. No matter how routine a situation may be, it becomes a difficult one to resolve when public interest is great.

Money is another element which may have a significant effect on certain legal cases or problems. The review, preparation, and negotiation of contracts and other legal documents, the conduct of hearings and trials, the giving of advice to administrators, the review and preparation of drafts of legislation, and any other attorney

endeavor will generally require special care and attention when a large amount of money is involved, unless the case or problem is otherwise routine (e.g., review of a standard form contract). Also, not all legal matters involve money nor can they be equated to money terms. Such matters are evaluated in light of other elements.

* * * *

These elements are not independent of one another. For example, the economic, political, or social impact of a case cannot be considered apart from its importance as a legal or administrative precedent. If a case is precedent setting, its impact in any of these terms is compounded. Likewise, a case that involves a considerable amount of money or materially affects a significant segment of private and public interests is apt to be strongly contested or negotiated by highly competent legal counsel. On the other hand, less emphasis ordinarily should be given to these elements of impact when the legal questions are clearly drawn and covered by clearly applicable precedents. Therefore, the interrelationship of these elements must be considered in evaluating the nature of the case or legal problem.

* * * *

Many (if not most) attorneys are engaged in the business of *preventing* litigation or other legal problems from developing, rather than resolving them once they have developed. In these situations, such elements as impact or public interest are not as apparent as they would have been had a problem arisen. However, positions involved in preventive legal work are credited similarly to those positions involved in resolving the problems, i.e., those elements of the nature of the case or legal problem which are not manifest, as a result of the preventive action, should be credited as they would have been if the situation had attained major proportions.

* * * *

Unless the word "case" can be seen from the content to mean formal litigation, the words "case" and "legal problem" are used herein in their generic sense and en-

compass any legal assignment performed by an attorney whether it be of a formal or informal nature.

* * * *

(2) *Level of responsibility*—This factor incorporates all those elements which are indicative of the level at which an attorney carries out his assignment. The factor includes the functions performed, the supervision and guidance received, the personal work contacts, and the nature and scope of recommendations and decisions.

The level of *functions* performed provides perspective to the level of responsibility factor. It reflects the maturity level of the attorney's endeavors in terms of what he does in connection with a case or legal problem. This element includes functions involved in trial, advisory, hearing, and legislative work. Each of these functions has parallel types of responsibilities, contacts, recommendations, and decisions depicted at the various intensity levels of this factor.

In some instances an attorney may lay the groundwork for presentation of the Government's case, but the actual trial is conducted by another attorney. In determining the level of trial work represented by the attorney who prepared the case, the extent of his participation is weighed. If he lays the complete groundwork for the Government's case, his position is credited as it would have been had he personally tried the case. In short, trying a case is not inherently more difficult than preparing the same case for trial or vice versa.

Many Justice Department attorneys (and attorneys in other agencies responsible for the conduct of litigation in Federal courts) are responsible for considering, among other things, whether a matter is of sufficient importance to warrant prosecution; whether there is adequate evidence; and whether prosecution is likely to affect adversely other cases which may have originated in different agencies and are pending decision by the courts. These are considerations which can be credited only to the Justice Department attorney positions and to attorney positions in other agencies responsible for the conduct of litigation in Federal courts.

Supervision and guidance received is another element necessary in evaluating the attorney's level of responsibility. With more or less supervision and guidance the attorney's responsibilities decrease or increase as the case may be. The attorney who is given a problem to resolve with no accompanying instructions obviously has a greater degree of responsibility than another attorney who is given a similar problem with detailed instruction as to what to do and how to do it.

The *personal work contacts* element is another reflector of the attorney's level of responsibility. Other things being equal, the more important his contacts—the greater his responsibilities. For example, an attorney who presents his agency's view to a congressional committee has a greater degree of responsibility than an attorney who presents a similar explanation to his counterpart attorney in another agency. Many attorneys, however, while performing very difficult and important work, do not have need to contact persons other than their immediate associates. Positions of attorneys performing these noncontact functions are not to be penalized if they have the other characteristics of a particular level of responsibility.

The *nature and scope of recommendations and decisions* is again an element which indicates the level of an attorney's responsibility. The more important and authoritative his recommendations and decisions—the greater his degree of responsibility. An attorney rendering substantive advice on the terms of a contract has a greater degree of responsibility than an attorney reviewing the same contract for legal sufficiency and inclusiveness of the language.

* * * *

Three levels of intensity are described for each of the two basic factors. With respect to factor 1, nature of the case or legal problem, the three levels describe what could be classed *simple*, *difficult*, and *most difficult* cases or legal problems. These levels are intended to cover the full range of cases or problems. If a case or problem does not satisfy the requirements indicated for the level of one of the types, it is identified with the next lower

type because each type is described in terms of the minimum characteristics of the range of difficulty it represents.

The three ranges of difficulty or importance for nature of the case or legal problem represent the span of difficulty or importance of attorney work throughout the Federal Government. They are *not* intended to represent a span of difficulty or importance of attorney work found in every agency. Some agencies will not have cases or legal problems of the nature described in the third range.

With respect to factor 2, level of responsibility, the three levels cover what may be described as the *beginning*, the *intermediate*, and the *senior* attorney levels. The levels are labeled (A), (C), and (E), in recognition of the fact that there are positions that fall between these (described) levels. These intervening levels are represented by omitted letters (B) and (D). Unlike the levels described for nature of the case or legal problem, which are described in terms of minimum characteristics, these levels are described in terms of *typical* characteristics. Accordingly the intervening level (B) is appropriate when, for example, a position *compares with* level (A) in some respects and level (C) in others. The intervening level is also appropriate when a position *falls clearly between* two of the levels described with respect to the majority of elements. Unlike the type III level of factor 1, level E is not intended to be inclusive of the highest level of responsibility of nonsupervisory attorney positions.

The grade of an attorney position is determined on the basis of the combination of the highest factor levels which are representative of the position to a significant extent.

A grade-level conversion chart is provided showing how combinations of the two factors (*nature of the case or legal problem and level of responsibility*) convert to grade levels. The conversion chart includes the intervening levels (B) and (D), as well as the described levels (A), (C), and (E), for the *level of responsibility* factor.

THE EFFECT OF INDIVIDUAL STATURE IN THE PROFESSION

From time to time incumbents of professional legal positions are encountered who have achieved outstanding stature in their particular area of law (i.e., admiralty, labor, tax, and general law), so that their opinions are generally recognized by other attorneys as especially authoritative and are sought after and given special weight. Normally attorneys are not in a position to accomplish something of enduring significance until they have matured in the profession and progressed in the organization to a point where their actions have a significant influence on the agency's program. Accordingly, this factor, except in unusual circumstances, is applicable to GS-13 positions and above.

Individuals who have achieved this outstanding stature bring a plus element to the performance of the assigned duties of their positions, which cannot always be fully evaluated in terms of the criteria spelled out in the body of the standard. In such cases it is appropriate to identify the nature of this peculiar stature and to provide some credit for it in evaluating the position. This extra credit will not normally, in itself, be worth an additional "bonus" grade. However, in evaluating positions which meet the requirements of a *level of responsibility* with respect to some elements of evaluation and fall short with respect to other elements, this effect of the individual on the position should be recognized in evaluating it to the higher responsibility level, which in some cases will make a difference of one grade in the conversion to grade level.

Stature in the legal profession is usually attained through accomplishments of enduring significance. For example, should an attorney write a treatise on a particular area of law related to his work, and subsequently become recognized by attorneys and management officials as an expert in this particular area, he has attained stature in his area of law. Also an attorney may become so well versed in his subject-matter field that he becomes the "oracle" *in his organization on that subject.* If the

individual has brought something to the position which cannot be replaced if he subsequently resigns, this too may be an indication of stature. The fact that management would not fill a given position upon the incumbent's resignation without first diluting the duties and responsibilities of the position is evidence that the current incumbent has outstanding stature.

An attorney may have brought attention to himself by having once pursued an extremely difficult legal problem to a successful conclusion. Subsequently, management has looked to him for the continued highly competent handling of matters which it considers of the utmost importance. Stature is attained this way also. Generally this situation is manifest by the assignment of more difficult duties and responsibilities to the individual. However, because of unusual workload situations the incumbent may on occasion be assigned cases or legal problems not of his traditional level of difficulty. This does not preclude the continued recognition of stature. Stature is not something that rises and falls with each project —rather it is a cumulative attainment.

Since stature is relative to the duties and responsibilities of the position, the breadth of the stature may be either local, regional, or national.

The stature of an individual is an attainment for management officials to identify.

THE USE OF EXAMPLES TO ILLUSTRATE LEVELS

In the description of levels for the two factors, in some instances, illustrative examples of difficulty and responsibility are included. These examples are illustrative only and are not intended to be all inclusive. They are to be used only as guides in classifying attorney positions. In other words, the absence, from a given level, of a specific example, does not preclude the use of that level (if it is otherwise appropriate) in the evaluation of a position.

VARIETY

Variety has not been used as a separate element in this standard, since many attorney positions are inherently varied. In smaller organizations particularly, attorney positions may encompass a range of subjects and activities. Accordingly, at the various degree levels of the standard, work examples are cited which are illustrative of positions involving variety.

1. *NATURE OF CASES OR LEGAL PROBLEMS*

Type I

Legal work of this type is characterized by the following features:

(1) The legal question or factual situation can be relatively easily resolved in the light of the well-established or easily determinable facts and clearly applicable precedents involved.

(2) The impact of cases or legal problems is local, or limited to the parties directly concerned (private individuals or a local industry) since legal or administrative sanctions, fines, or penalties are relatively minor and involve no new precedents of wider potential impact.

(3) Relatively limited sums of money are involved (e.g., a few thousand dollars). The cases have no widespread social or political impact. For example, where industry practices are involved no major effect on the industry can result from the decision. There is limited public interest in the case or legal problems.

Type II

Legal work of this type is characterized by *one* or more of the following features:

(1) Difficult legal or factual questions are involved because of the absence of clearly applicable precedents due to the newness of the program or the novelty of the issue; or it is highly arguable which precedents are applicable to the case at issue because of the complexity of the facts or the different possible constructions which may be placed on either the facts or the laws and precedents involved.

(2) The impact of the case or legal problem affects, economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests (e.g., a large corporation, a large labor group, the residents of a large geographical region of the United States as in a large public works project, a large grant-in-aid program, a nationally organized professional group, the producers of a given farm commodity, the manufactures of a given product, a class of Government contractors, i.e., suppliers of a particular service or product, or an important program of a Government agency). Also included in this type are cases or legal problems which have an impact on relations between the United States and foreign governments (e.g., acts by servicemen or other representatives of the United States stationed abroad, questions such as whether or not to buy foreign or American products, or negotiating and drafting consular conventions) and which must be handled with great care.

(3) Large sums of money are directly or indirectly involved (e.g., about one hundred thousand dollars), or there is considerable interest from a significant segment of the population (see paragraph 2 above),

or the case is strongly contested in formal hearings or informal negotiations by the private individuals, corporations, or Government agencies involved.

Type III

Legal work at this level is characterized by *one* or more of the following features:

(1) Extremely complex and difficult legal questions or factual issues are involved in the drafting, interpretation, or application of legislation, regulations, contracts, orders, decisions, opinions, or other legal instruments and require for their solution a high order of original and creative legal endeavor in order to obtain a reasonable balance of conflicting interests (e.g., legal work involved with balancing the requirements of national security with individual liberties, determining the legality of State and local taxation of the use of Federal Government property by private business firms, recommending or making policy concerning consent decrees in antitrust litigation, or legal work involved in developing material for Executive orders concerning the use of Federal troops in a domestic emergency); or complex factual or policy issues are involved requiring extensive research, analysis, and obtaining and evaluating of expert testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical areas.

(2) The case or problem is such that it can have the effect of substantially broadening or restricting the activities of an agency (e.g., the enforcement of antitrust and trade regulations, tax laws, food and

drug laws, or the laws governing securities transactions); or it has an important impact on a major industry whose economic position affects the health and stability of the general economy (e.g., a merger or reorganization involving a basic industry, or on the rates, practices, or competitive position of a major industry, for example, the position of the railroads in relation to the motor carriers based on the "reasonableness" of their respective rates, or the position of domestic airlines operating overseas in relation to restrictions on foreign airlines operation in this country). It has an important impact on major private or public interest (e.g., a substantial broadening or restriction of benefits to veterans under the law, amounting to many millions of dollars annually, or a major extension or revision in a State and/or other grant program or a nationwide retirement system, the development of administrative regulations of such scope as the Armed Services Procurement Regulation, a substantial question of civil rights involving the due process clause, or a statement defining the legal rights of the Four Powers with respect to Berlin). Also included in this type are problems of unusual delicacy, such as fraud cases, because of the serious consequence of error and the great burden of proof assumed by the Government.

(3) Cases or problems of this type frequently involve, directly or indirectly, very large sums of money (e.g., about a million dollars) and/or they are frequently vigorously contested by extremely capable legal talent (e.g., a major antitrust case). Interest in these cases is generally nationwide.

2. *LEVEL OF RESPONSIBILITY*

Level A

Nature of functions

This level is characterized by functions, examples of which are listed below.

Searches case reports, legal documents, periodicals, and textbooks; and prepares tentative drafts of letters, memoranda, and legal documents for use by higher-grade attorneys in the preparation of opinions, legislative reports, briefs, contracts, and other papers or legal documents (i.e., particular points of law as decided in previous cases; background information and legal references as a basis for advising on management plans and policies, compilation of legal issues and legislative history in connection with pending legislation).

Assists the attorney in charge of a court case or an administrative proceeding by interviewing and selecting appropriate witnesses, preparing them to give testimony, conducting direct examination, suggesting questions to be asked in cross-examination, cross-examining witnesses after the line of questioning has been settled, and drafting findings of fact, conclusions-of-law, and orders based upon the record.

Prepares cases for filing by drafting complaint, order to show cause, indictment, preliminary motions, and supporting affidavits and briefs.

Prepares drafts of pleadings, motions, and interrogatories in connection with cases in litigation.

Conducts investigations of limited scope to obtain facts, studies legal precedents, and prepares recommendations for review of a supervisor.

Supervision and guidance received

Legal research is performed in accordance with preliminary instructions as to methods of approach, source material available, and policy and precedent of the office.

Participation in hearings is limited to examination or cross-examination where the line of questioning has been

carefully laid down by the attorney in charge of the case and where the issues with respect to the points to which the particular witness is expected to testify are well defined and narrow in scope.

Completed written work is thoroughly reviewed usually by an attorney of higher grade who points out errors, omissions, and inadequacies, and corrects or directs the incumbent to correct them.

Personal work contacts

Personal work contacts constitute a relatively minor element at this level. The most important contacts are those involved in fact gathering. Contacts initiated by the incumbent are principally in obtaining information and/or legal references pertinent to the problem under study, and interviewing prospective witnesses, claimants, or other persons having knowledge of the facts involved in the problem or the case. As experience is gained, may advise agency personnel on minor matters or may participate in hearings or trials through examining witnesses along lines of inquiry laid down by an attorney of higher grade level.

Attendance at conferences with representatives of other agencies, industry, State and local governments, higher administrative officials, or congressional committees and their staffs is largely as an observer to gain experience.

Nature and scope of recommendations and decisions

The incumbents are responsible for the accuracy of factual information and legal citations, which are incorporated in the decisions, opinions, briefs, and other legal documents prepared by attorneys of higher grade level. Legal opinions, analyses, and conclusions ordinarily are not expected to be in finished form (except for relatively routine legal correspondence).

Level C

Nature of functions

This level is characterized by functions, examples of which are listed below.

Conducting legal research in connection with:

(1) Cases pending administrative hearings, trial before courts of original jurisdiction, or argument in appellate courts.
(2) Legal questions referred by administrative officials of the employing agency, such as questions concerning the interpretation and application of statutes, rules, and regulations as they pertain to contracts, claims, or other legal instruments involving private business, State, local, national, or foreign matters.
(3) Questions regarding the effects of provisions of proposed legislation or proposed changes in agency policies or regulations.

Where further development of facts is needed, refers question back to originating organization, to the operating organization affected by a proposal, or to the investigating arm of the employing agency, indicating the precise nature of information required. In criminal cases may recommend a grand jury investigation.

In some situations, personally conducts research or investigation of the facts as well as the laws regulations, and legal precedents. Such research or investigation may involve any of the following:

(1) Analyzing the factual and legal issues presented to determine what further facts are needed and what legal sources are applicable.
(2) Reviewing policies, procedures, regulations, technical manuals, and other agency publications.
(3) Studying industry and trade practices; policies, procedures, and operations of other Government agencies or of the States or local bodies; or business, technical, and professional publications and other authoritative sources of information required in the technical interpretation of factual issues.

(4) Conducting research of laws, legal opinions, policies, regulations, legal texts, and precedent cases bearing on the legal issues involved in the problem, proposal, or case.
(5) Conducting pretrial examination of witnesses, or —in the performance of advisory services or legislative review—interviewing operating officials, industry spokesmen, and other interested persons to complete the background investigation.
(6) Preparing memoranda or reports outlining the facts and legal issues, analyzing the factual and legal issues involved, explaining the application of legal principles and precedents, and justifying recommendations or conclusions.

On the basis of the research or investigation, prepares necessary legal documents, advisory opinions for administrative personnel, drafts or comments on proposed legislation or changes in regulations, or recommendations on the advisability of instituting a civil or criminal suit, an administrative hearing, or other disposition.

When litigation is undertaken, prepares and/or presents, or provides technical guidance during, the prosecution of the Government's or the agency's case in an administrative hearing, before a court of original jurisdiction or appellate court. Prepares charges, show cause orders, complaints, briefs, motions, and other documents preparatory or incident to the trial of the case.

Participates in pretrial or prehearing conference, examines and cross-examines witnesses, argues motions before the court or hearing officer, and summarizes the Government's or the agency's case.

When the activities of the agency require entering into contractual relations, negotiates (usually as a member of a team) with the representatives of private business or of State, local or foreign governments, and drafts the necessary contracts and other legal documents.

Examines formal filings for legal sufficiency and full disclosure required to be made by statutes, rules, and regulations. Conducts or participates in conferences with legal counsel of registrant, or reviews opinions of counsel

as to meeting filing requirements. Conducts any investigation and any subsequent administrative proceedings in connection with such matters.

Some of the functions enumerated above may be delegated to attorneys of lower grade level, who work under the guidance of the incumbent.

Also characteristic of this level are such duties as examining petitioners, claimants, and defendants against charges brought under the administrative regulations of an agency; and preparing reports, exhibits, and legal memoranda from the records and hearings, outlining the factual and legal issues and the recommendation for disposition of the case for the consideration of quasi-judicial officers or bodies, or the courts.

Acts regularly as the legal adviser on the plans and operations of a single program or activity, characterized usually as a distinct entity with separate, identifiable operations, authorized by law to accomplish a specific purpose (e.g., child health, school assistance in federally affected areas, interstate quarantine) but included in a group of related programs. May also serve as the assigned specialist on a single program or a major phase of several related programs or major activities.

Reviews for legal soundness and accuracy program material emanating from operating units of the organization.

In cases of sufficient scope and complexity to require the services of a staff of several attorneys or other specialists to present the Government's case or position, has responsibility for conducting *a phase* of the trial or other type legal problem under the guidance of the attorney in charge.

Supervision and guidance received

Incumbents of positions at this level of performance are expected independently to plan, organize, and conduct studies of the mill run of legal problems, cases, or legislative proposals encountered in their respective programs. They are apprised of any unusual circumstances surrounding the case or the problem, any back-

ground information which must be considered, and any important policy considerations that will govern development of the case or the solution.

Beyond this, they normally work independently in investigating the facts, searching legal precedents, defining the legal and factual issues, drafting the necessary legal documents, and developing conclusions and recommendations.

Completed work is normally assumed to be accurate with respect to legal citations, treatment of facts, and other aspects of technical treatment. However, all written work is subject to review for soundness of approach and argument, application of legal principles, and consistency with governing policies, procedures, and regulations of the employing agency.

Before a case is presented in an administrative hearing or before a court, the supervisor discusses the presentation, the line of approach, the possible lines of opposition to be encountered, and other aspects of the case to insure that proper groundwork has been laid for successful prosecution of the case.

Personal work contacts

Generally, personal work contacts are an important characteristic of this level. Effectiveness is required in presentation, exposition, and argument in presenting cases to administrative hearings and to courts.

Attorneys participate in pretrial or prehearing conferences with industry representatives or private citizen claimants, defendants, or petitioners and their attorneys, explain points of law, charges, or qualifications of claimants, and refer suggested settlements or compromise offers to superiors with appropriate recommendations.

They advise negotiating officials in legal contractual matters by recommending appropriate clauses, provisions, and general wording.

Also characteristic of this level is participation in conferences with representatives of operating programs, State and local governments, industry, private organizations (e.g., veterans organizations, professional associations), or other Government agencies in developing or evaluating proposed changes in legislation or agency policies or regulations.

Incumbents participate in negotiations concerning conflicts in State and Federal regulations with State officials.

Incumbents assist the staffs of congressional committees in technical drafting of legislation.

Nature and scope of recommendations and decisions

Recommendations to those outside the agency or to administrative officials at higher levels are normally made through the supervisor. Examples of recommendations characteristic of this level include:

(1) Whether to initiate criminal or civil suits against alleged violators of Federal laws and regulations.
(2) Settlement of claims against the Government brought by private citizens.
(3) The organization, order of presentation, and line of argument to be used in the presentation of cases or hearings delegated to the incumbent as the trial attorney.
(4) Settlement of suits brought by the government against others (e.g., offers in compromise in income tax cases).
(5) Replies to requests for legal advice or interpretations of law arising out of the day-to-day operations of agency programs.
(6) Substantive changes in legislation and agency policies or regulations to make them more equitable, responsive to needs, or easier to administer.
(7) Whether to approve a contract or other legal document in its proposed form and content.

Level E

Nature of functions

This level is characterized by functions, examples of which are described below.

Reviews cases for agencies responsible for the conduct of litigation in Federal courts to determine whether to

recommend prosecution. Considers the weight of the evidence, the importance of the case, the necessity of uniform application of the law throughout the land, the cost of litigation, and other considerations which bear on the advisability of instituting suit. Prepares a memorandum of fact and law and recommends whether prosecution should be undertaken. Generally, the memorandum is submitted directly to the individual responsible for authorizing formal legal action. If prosecution is authorized, initiates the filing of papers with the appropriate court, prepares and tries the case, or prepares the case for trial by another attorney. If the case is assigned to another attorney for trial, may advise and assist him. This assistance may extend to active participation in the presentation of the case, preparing witnesses, examining and cross-examining witnesses, and consulting with the trial attorney with respect to the line of argument.

Reviews, for agencies responsible for appellate litigation, records of suits for or against the Government in which the decision was unfavorable to the Government to determine whether to recommend appeal to a higher court. Considers the effect of the decision as a precedent if allowed to stand, the weight of the evidence, the need for consistent application of the law in all jurisdictions, the amount of money involved, the cost of litigation, and other considerations bearing on the advisability of appeal. If appeal is recommended, and the recommendation approved, may prepare and/or present the Government's case before the appellate court.

Drafts legislation or prepares complete reports on changes in basic legislation. Drafts or receives proposed legislation and refers to organizations having jurisdictions over programs which would be affected by the proposed changes in law. Evaluates the proposed legislation in terms of its foreseeable effect on agency programs, policies, procedures, regulations, methods of operation, and extent of operation, and on existing legislation. This evaluation is based on an analysis of the comments of operating organizations, the incumbent's own program knowledge, his awareness of the legal implications of the proposed legislation, and his knowledge of related legislation. Similar functions are performed with respect to the formulation and/or coordination of treaties or other international agreements or of rules, regulations, or policies applicable to major programs of the agency.

At the highest level of drafting or reviewing proposed agency decisions, analyzes the records, including transcription of testimony and pleadings, evaluates facts, determines questions of law, and either recommends adoption of a decision prepared by another attorney or drafts his own decision for consideration and adoption by agency officials who exercise final authority in such matters. This does not preclude the use of this level for positions at subordinate organizational echelons if, in fact, the drafting or reviewing of proposed agency decisions at such echelons is independently done, is directly submitted (with no further technical review) to agency officials who exercise final authority, and is given weight and effect equal to the recommendations of incumbents of positions at the highest agency level of drafting or review.

Acts as principal attorney in charge of the preparation and presentation of cases before administrative tribunals or before the trial or appellate courts, where the cases (a) are of such scope that they may, in many instances, warrant the assistance of one or more attorneys of lower grade or other specialists and (b) are of such importance that they frequently involve matching professional skills against some of the most distinguished and highly paid legal talent in the country. The principal attorney exercises full responsibility for the development and presentation of the case.

Acts as principal attorney in charge of recommending the policies and developing the procedures and regulations implementing new or amended legislation (e.g., new or revised grant-in-aid programs) for the employing agency. Is responsible for insuring that these policies, procedures, and regulations are consistent with the intent of the law and are administratively sound, efficient, and economical in operation. In developing the details of operations considers the needs, desires, and attitudes of administrators, State and local officials, industry representatives, the general public, or others who may be affected by the new or revised program.

Acts as legal counsel to the head of a major operating program of the department or agency (e.g., a bureau, command, technical service, or regional office or field installation when the field installation has been delegated unusual authority or authority commonly of a higher echelon). Is responsible for advising on questions of law or administrative policy involved in the operations of the organization and in its contacts with industry, private and professional associations, State, local, or foreign government, or the general public. Advises on laws, regulations (including those who have the effect of law) of his own and other Federal agencies, opinions of the Comptroller General or the agency's general counsel, common law, administrative law, etc. Answers questions which are covered by interpretations of the Comptroller General or other legal authority. Is responsible for recognizing those questions which require an interpretation by such legal authority. Prepares recommended interpretation outlining the facts and the applicable law. Is responsible for developing the material which, in effect, becomes the agency's justification for the conduct of litigation on behalf of the agency by a litigating agency.

Sits as a quasi-judicial officer hearing cases involving claims against the Government, complaints, or requests for relief from the provisions of agency regulations which have the effect of law; conducting investigative hearings pursuant to statutory provisions to establish a formal written record; hearing charges brought by the Government against violators of provisions of law or regulations; or hearing cases arising under the disputes clause of a government contract. Renders decisions on the points of law or construction of fact in dispute and directs corrective action, payment of claim, or discretionary relief depending on the merits of the case and the penalties and permissible relief under law and regulations.

Supervision and guidance received

Attorneys at this level are expected to carry out any assignment within their area of responsibility without preliminary instruction. At the time an assignment is

made the supervisor may discuss the significance of the problem and give any background information received. From this point, the incumbent independently conducts the investigation or negotiation, plans the approach, and develops the completed decision, report, brief, opinion, contract, or other product; or represents the Government at the conference, hearing, or trial. Where a hearing or trial is involved, the supervisor may be briefed on the overall approach to be taken and the line of argument to be pursued, especially where an important precedent effect is anticipated or there is widespread public interest in the outcome. Completed work in the advisory or legislative and regulatory areas is reviewed before it is signed out for consistency with agency policy, for possible precedent effect, and for overall effectiveness.

Personal work contacts

This level is characterized by the most responsible personal contacts, examples of which include:

(1) Conferring or negotiating with top administrative personnel in the agency, private business, or State, local, or foreign governments on important legal and policy questions.
(2) Advising and assisting congressional committees and their staffs in drafting legislation or giving expert testimony before congressional hearings on legislative proposals.
(3) Trying cases before courts or administrative bodies.

Nature and scope of recommendations and decisions

Recommendations characteristic of this level are similar to those characteistic of level (C). The major difference is that at this level advice on the interpretation of law or on proposed changes in legislation, policy, and regulations is often given directly to heads of programs, bureau chiefs, cabinet officers, congressmen, or representatives of State and local governments. In some instances recommendations are made through supervisors, as at level (C), but these recommendations are usually tantamount to final decision. This is particularly pertinent to posi-

tions concerned with recommending whether to prosecute cases or to appeal adverse decisions in agencies responsible for litigation.

Incumbents are responsible for recognizing when the matter under discussion is of such precedent-setting nature or of such importance or delicacy that his advice must be cleared with superiors before it is given out.

Attorneys at this level often deal with matters of such scope and complexity that they require the concentrated efforts of several attorneys or other specialists. In such circumstances attorneys at this level are normally responsible for directing, coordinating, and reviewing the work of the team.

GRADE-LEVEL CONVERSION CHART

Nature of Cases or Legal Problems	*Level of Responsibility*	*Grade*
TYPE I	A	*
	B	9
	C	11
	D	12
TYPE II	A	9
	B	11
	C	12
	D	13
	E	14
TYPE III	A	11
	B	12
	C	13
	D	14
	E	15

* Assignments involving Type I cases or legal problems, and *A* level of responsibility, are not found in the Attorney profession. Where relatively clear-cut cases or problems are involved, the attorney who is assigned Type I cases typically operates at the B level of responsibility, or higher.

Persons who have graduated from law school but not yet passed the bar examination may be assigned clear-cut cases of Type I and work under close, step-by-step supervision as outlined in Level A. The grade of such positions would be GS-7. Such positions are classified in the Law Clerk Series, GS-904.

IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 128-72

(Filed September 14, 1973)

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

v.

THE UNITED STATES

Edwin J. McDermott, attorney of record, for plaintiffs. *LeRoy Southmayd, Jr.*, with whom was *Assistant Attorney General Harlington Wood, Jr.*, for defendant.

OPINION*

SPECTOR, *Trial Judge*: The plaintiffs are Government lawyers currently and at all relevant times mentioned herein employed as trial attorneys, grade GS-905-13, in the Office of Counsel, Defense Personnel Support Center (DPSC), Defense Supply Agency (DSA), in Philadelphia, Pennsylvania. Through supply contracts with Government contractors, the DPSC procures and then distributes food, clothing, and medical supplies to the U.S. Army, Navy and Air Force, and to other nondefense agencies of the Federal Government. Plaintiffs' positions consist of representing the Government in appeals brought before the Armed Services Board of Contract Appeals

* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

(ASBCA) under the disputes article found in all Government contracts.

On December 9, 1969, Donnell K. Wolverton, Chief Attorney of the Office of Counsel, DPSC, submitted individual requests for personnel action to the Office of Civilian Personnel seeking reclassification of plaintiffs positions to grade GS-905-*14* In support of his request, Mr. Wolverton stated that plaintiffs' duties and responsibilities meet the requirements for the higher grade under the criteria contained in the General Attorney Series, GS-905-0, the applicable classification series published by the Civil Service Commission.

In addition, Mr. Wolverton stated that plaintiffs' positions were essentially the same as those of ASBCA trial attorneys in the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base at Dayton, Ohio. The latter are classified GS-905-14. Data in support of his request was submitted both prior to and in response to a request for additional specific information.[1] After an audit, Regina B. Graham, a position classification specialist, concluded that plaintiff's assigned duties were properly classified at the GS-905-13 level. On May 8, 1970, the director of the Office of Civilian Personnel so ruled.[2]

Plaintiffs appealed this decision to the Civil Service Commission, Philadelphia Region, submitting voluminous material concerning their work load, responsibilities, types of cases and issue litigated, and lists of the dollar amounts in controversy. Their appeals were denied by the regional director on July 20, 1970.[3] Plaintiffs requested reconsideration shortly thereafter, and submitted supplementary data in support of their request. By letters of November 13, 1970, plaintiffs were informed that their requests were once again denied.[4]

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[1] *See* findings 7 through 10.

[2] *See* findings 11 and 12.

[3] *See* finding 14.

[4] *See* finding 16.

After correspondence and an interview with the Classification Appeals Office, plaintiffs, on January 17, 1971, formally requested the reopening and reconsideration of their appeals. On February 23, 1971, the regional Classification Appeals Office informed plaintiffs that the opinion remained unchanged.[5] On April 20, 1971, plaintiffs appealed to the Civil Service Commission. By letter of July 14, 1971, the assistant to the commissioners (appeals) notified plaintiffs that their request to reopen the case had been denied.[6] There can be no doubt that plaintiffs have diligently sought relief through appropriate administrative channels.

At each administrative level, as well as in the case filed in this court, two semantically separate but theoretically similar arguments have been advanced. In summary, the first of these is that plaintiffs' positions are independently entitled to classification GS-905-14 by application of the standards expressed in General Attorney Series GS-905-O. The second point is that plantiffs' positions are substantially identical to those held by trial attorneys employed at the Contract Appeals Division of the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base. Dayton, Ohio (AFLC). By the same token, the administrative responses to these arguments have not varied.

As to the first argument, the uniform response has been that plaintiffs' positions were correctly classified under the standards expressed in the General Attorney Series. As to the second. it has been stated[7] that comparison with positions at other military services is not a proper manner of classification.

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[5] *See* finding 17.

[6] *See* finding 18.

[7] By the Regional Office of the Civil Service Commission in Philadelphia and the Classification Appeals Office of the Civil Service Commission.

In this action plaintiffs seek a judgment and an order directing reclassification [8] as of May 8, 1970 (the date of the first adverse action by DPSC) as well as back pay accrued from that date.

For a better understanding of the facts, it is appropriate to explain briefly the function of the ASBCA before whom plaintiffs (and the attorneys at AFLC with whom they compare themselves) practice as Government trial attorneys. The ASBCA serves under the standard contract disputes clause as the authorized representative of the Secretaries of Defense, Army, Navy, and Air Force, to hear and determine appeals from contracting officers' decisions on disputes arising out of contracts between the defense agencies and Government contractors. Hearings before the board are similar to those provided by the regulatory agencies.

Contractors may represent themselves or retain counsel. The Government is represented by counsel from the procurement directorate of the defense component which entered into the particular contract on behalf of the Government. In this way, plaintiffs have the responsibility for representing the Government before the ASBCA in the case of all appeals originating out of DPSC contracts.

The trial section of the Office of Counsel at DPSC consists of plaintiffs at grade GS-905-13, and a chief trial attorney, Oscar A. Moldawer, at grade GS-905-14. Cases are assigned to plaintiffs and to himself by the chief trial attorney on a random basis, and without regard to their comparative difficulty or complexity.

By way of comparison, the trial attorneys at AFLC, Dayton, Ohio, similarly represent the Government before the ASBCA in the case of appeals originating out of Air Force contracts. The Directorate of Contract Appeals consists of the director (a colonel), the deputy director (a lieutenant colonel), and two "divisions" of trial attorneys. Of the total of six civilian trial attorneys, two

[8] Although plaintiffs' petition sought reclassification to the GS-905-*14* level, their brief urges reclassification to the GS-905-*15* level, for reasons developed therein.

are graded GS-905-*15*, three GS-905-*14* and one GS-905-*13*.

The two attorneys serving in the highest graded positions (GS-15) are called senior trial attorneys and operate independently of the "division" system. They are responsible to the director or deputy director for contract appeals. These two handle the most difficult and complex cases. On occasion they may be asked to advise higher authority concerning a complex and significant case.

The three attorneys functioning at the GS-905-14 level are subject to the administrative supervision of the division chief but receive no direct professional supervision. The one attorney at the GS-905-13 level receives both administrative and professional supervision from the division chief.

Position descriptions, which are detailed summaries and analyses of the functions and responsibilities of particular Government jobs, have been prepared for plaintiffs and for the corresponding AFLC positions.[9] A comparison of the position descriptions at DPSC and AFLC demonstrates that they are strikingly similar. In all cases, the major responsibility consists of the preparation and execution of a trial of an appeal before the ASBCA. The only significant dissimilarities exist with respect to the trial attorney positions at AFLC in grades GS-905-15 and 13, whereas plaintiffs' petition is directed to grade GS-905-14. The grade GS-15 job at AFLC describes trial of the "most difficult and most important cases" handled by that command, reflecting a process of selection as well as supervision of attorneys of lower grade. Plaintiffs handle any type of case at DPSC, without preselection. The GS-14 attorneys at AFLC handle the remaining cases, after the "most difficult" have been selected out for the GS-15's. The grade GS-13 position at AFLC envisions work controls, in the form of both administrative and professional supervision, by the division chief.

[9] *See* findings 5, 8, 20 and 21.

At the GS-905-14 level (which is the subject matter of this case), no appreciable differences appear from a comparison of plaintiffs' position descriptions with the corresponding positions at AFLC (other than that plaintiffs also handle the "most difficult" cases). They both require the incumbent to conduct pretrial proceedings, to prepare and file all necessary legal papers, to review and evaluate the facts, to participate in pretrial hearings, to conduct legal research, to interview and select factual and expert witnesses, to brief and argue all motions, to represent the Government at trial, using techniques and legal theories based on their own independent judgment, to submit posttrial briefs, to determine whether and when a case is appropriate for settlement, and, if it is, to negotiate and execute such settlements.

The only differences in the wording of the two descriptions are insignificant. The GS-905-14 position at AFLC includes the furnishing of legal advice to contracting officers on decisions rendered before an appeal is taken to the board. The record shows that plaintiffs perform that pretrial function also. Plaintiffs' descriptions mention final review of ASBCA decisions for the purpose of determining whether motions for reconsideration should be filed. Presumably the trial attorneys at AFLC conduct a similar review within the ambit of their trial responsibilities.

In summary, the grade GS-14 position descriptions at both locations envision a high degree of independent action in preparing and presenting cases before the ASBCA, and both describe the incumbent as merely under administrative, rather than professional, supervision. If there are any differences, they favor plaintiffs.

In spite of the virtual identity of the position descriptions and duties performed pursuant thereto, plaintiffs have been graded at one level below those performing the same trial attorney function at AFLC, resulting in this controversy.

The alleged justification for that result at the administrative level is not easy to follow. It is expressed as a uniform refusal to classify by comparison of positions. The process of classification, it is urged, is based

on the General Attorney Series earlier mentioned. It is expressed as an elaborate and wordy system, designed to produce a precise result.[10] Boiled down to its essentials, positions in this series are rated on the basis of two factors; the difficulty of the work assignments, and the degree of responsibility. After each factor has been evaluated independently, the applicable grade level is determined through the use of a conversion chart. In practical effect, this involves a comparison of the wording of the position description, against the wording contained in the General Attorney Series. It must be assumed that an incumbent actually performs the duties described in his position description. It has been previously illustrated that the position descriptions for grade GS-14 at both DPSC and AFLC are virtually the same.

As a matter of fact, plaintiffs and their counterparts at AFLC have in fact been evaluated at the same level (level D) in terms of the second factor described in the General Attorney Series, namely, "degree of responsibility involved." In its simplest terms, this factor is measured by comparison with three basic levels in the series, described as A, C, and E, in ascending degree of responsibility. Rating of this factor is to reflect the typical, rather than the minimum, characteristics of a position. Although no guidelines are given for levels B and D, these designations are available for optional use where the degree of responsibility falls somewhere between the letters listed above.

Plaintiffs urge strongly that they are entitled to be rated at level E (as are the GS-15's at AFLC) rather than level D on "degree of responsibility." While that argument may have merit, it is not necessary to a disposition of this case to determine whether the assignment of level D is arbitrary or represents an abuse of discretion. Plaintiff's positions and those of the GS-905-14's at AFLC are ranked equally on this factor, and the petition seeks GS-14's, not GS-15's (which is sought in the briefs). In any event, treatment of the other factor is dispositive of the case as set forth in the petition.

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[10] *See* finding 4.

Under the General Attorney Series, the first factor "[n]ature of the case or legal problem," is intended to measure the degree of difficulty to be ascribed to the work performed by attorneys. In determining the "degree of difficulty," several elements are evaluated separately, and are then grouped and assigned to one of three levels of difficulty. Specifically, the elements considered are the complevity of the legal and factual issues involved, the availability of precedent, the impact of the case in economic, social or political terms, its importance as legal or administrative precedent, the nature of the competition encountered, the delicacy of the problem, the public interest, and the amount of money involved. As might be expected, type I includes those cases in which factual and legal questions are easily resolved, precedents are clearly applicable, relatively small amounts of money are involved, and there is little or no impact beyond the immediate parties.

The characteristics of types II and III are more minutely detailed. Type II cases are described as those involving *one* or more of the following features:

(1) Difficult legal or factual questions are involved because of the absence of clearly applicable precedents due to the newness of the program or the novelty of the issue; *or* it is highly arguable which precedents are applicable to the case at issue because of the complexity of the facts or the different possible constructions which may be placed on either the facts or the laws and precedents involved.

(2) The impact of the case or legal problem affects, economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests (e.g., a large corporation, a large labor group, the residents of a large geographical region of the United States as in a large public works project, a large grant-in-aid program, a nationally organized professional group, the producers of a given farm commodity, the manufacturers of a given product,

a class of Government contractors, i.e., suppliers of a particular service or product, or an important program of a Government agency). Also included in this type are cases or legal problems which have an impact on relations between the United States and foreign governments (e.g., acts by servicemen or other representatives of the United States stationed abroad, questions such as whether or not to buy foreign or American products, or negotiating and drafting consular conventions) and which must be handled with great care.

(3) Large sums of money are directly or indirectly involved (e.g., about one hundred thousand dollars), *or* there is considerable interest from a significant segment of the population * * * *or* the case is strongly contested in formal hearings or informal negotiations by the private individuals, corporations, or Government agencies involved. [Emphasis added.]

Type III cases are described as involving *one* or more of the following characteristics:

(1) Extremely complex and difficult legal questions or factual issues are involved in the drafting, interpretation, or application of legislation, regulations, contracts, orders, decisions, opinions, or other legal instruments and require for their solution a high order of original and creative legal endeavor in order to obtain a reasonable balance of conflicting interests (e.g., legal work involved with balancing the requirements of national security with individual liberties, determining the legality of State and local taxation of the use of Federal Government property by private business firms, recommending or making policy concerning consent decrees in antitrust litigation, or legal work involved in developing material for Executive orders concerning the use of Federal troops in a domestic emergency); *or* complex factual or policy issues are involved requiring extensive research, analysis, and obtaining and evaluating of expert

testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical areas.

(2) The case or problem is such that it can have the effect of substantially broadening or restricting the activities of an agency (e.g., the enforcement of antitrust and trade regulations, tax laws, food and drug laws, or the laws governing securities transactions); *or* it has an important impact on a major industry whose economic position affects the health and stability of the general economy (e.g., a merger or reorganization involving a basic industry, or on the rates, practices, or competitive position of a major industry, for example, the position of the railroads in relation to the motor carriers based on the "reasonableness" of their respective rates, or the position of domestic airlines operating overseas in relation to restrictions on foreign airlines operation in this country). It has an important impact on major private or public interests (e.g., a substantial broadening or restriction of benefits to veterans under the law, amounting to many millions of dollars annually, or a major extension or revision in a State and/or other grant program or a nationwide retirement system, the development of administrative regulations of such scope as the Armed Services Procurement Regulation, a substantial question of civil rights involving the due process clause, or a statement defining the legal rights of the Four Powers with respect to Berlin). Also included in this type are problems of unusual delicacy, such as fraud cases, because of the serious consequence of error and the great burden of proof assumed by the Government.

(3) Cases or problems of this type frequently involve, directly or indirectly, very large sums of money (e.g., about a million dollars) *and/or* they are frequently vigorously contested by extremely capable legal talent (e.g., a major antitrust case).

Interest in these cases is generally nationwide. [Emphasis added.]

On the "degree of difficulty" factor, plaintiffs have been rated as type II. In contrast, the grade GS-14 trial attorneys at AFLC have been rated as type III.[11] As can be seen from the aforementioned conversion chart (finding 4), D-III produces a GS-14.

The initial notification letter of May 8, 1970, stated that the cases handled by plaintiffs compared favorably with type II cases in that difficult legal and factual problems were involved, clearly applicable precedents are lacking, impact affected a significant segment of private or public interests (such as a class of Government contractors or the manufacturer of a given product), large sums of money were involved, or cases were strongly contested. The notification also contained the following statement:

b. The incumbents consider that the type of cases handled are such as to warrant Type III category. However, no conclusive evidence was found to support that contention. Type III cases, in fact, represent the most difficult type of attorney work situations throughout the entire Federal Government. The scope, magnitude and consequence of legal work prescribed for Type III, transcends that which could be recognizable in the subject positions. Even were it possible that some of the trial work might fall

[11] A "Substantiating Analysis" for the GS-905-14 positions at AFLC contains the following statement:

"The attached position is characterized by the following features of the attached description and is, therefore, of Type III. Preparation and drafting without instruction and supervision of opinions and legal instruments which involve complex factual and/or policy issues requiring extensive research, analysis, obtaining and evaluating expert testimony in controversial areas, i.e., scientific, engineer [sic] and financial fields. The cases and problems encountered may have the effect of substantially broadening or restricting the procurement activities of the United States Air Force. Further, the contractors are usually represented by leading attorneys who are extremely capable and who vigorously protest the position taken by the Government as represented by the Trial Attorney."

within the Type III category, it would necessarily have to predominate for it to be credible from a classification standpoint.

The same view has been repeated by the other administrative echelons earlier described.

When one has finally navigated the seas and shoals of words and phrases represented by the General Attorney Series and the position descriptions (*see* findings 4, 5, 8, 20, 21), a simple fact remains. Plaintiffs are responsible for performing as trial attorneys for the Government, before the ASBCA. They handle cases assigned without discrimination as to their relative difficulty or complexity, including the "most difficult." All contract appeals heard by the board originate out of Defense Department contracts governed by the same basic procurement statutes, regulations, and standard contract forms and clauses.[12] The rules of the board under which they practice, apply to cases assigned to plaintiffs, just as they do to any other appeal docketed before the ASBCA. Opinions resulting in part from their efforts are eligible for citation in any brief filed with the board; not just those originating in DPSC or DSA contracts. Similarly they would study and cite cases originating in other components of the Defense Department.

Anyone familiar with the work of trial attorneys, and specifically those specializing in Government contract disputes, knows that the particular commodity being procured by the Government is of relatively little importance in evaluating the difficulty and complexity of the case or the rule in the case. In all cases, a competent trial attorney marshals the evidence, organizes his witnesses, and studies and briefs the legal issues involved. Legal precedents are blind to the subject matter of the contract under review. The reports of this court are replete with decisions (some of which would be classified as "landmark" cases) dealing with procurement by the Army Quartermaster Corps, the functions of which have now been merged into the DSA and its

[12] For that matter, they are essentially uniform throughout the Government.

DPSC. As stated earlier, the DPSC now procures and then distributes food, clothing and medical supplies to the Army, Navy and Air Force and to other non-defense departments of the Federal Government as well.

In this context, position classifiers practice the art of describing in a sea of words, what attorneys do. By means of a conversion table, this art is then endowed with an aura of scientific precision. Alas, the differences in grade which result are often more reflective of attitude, and of the aptitude of a particular classifier in the art of hyperbole. In essence, these plaintiffs are doing the same work in the same department (Defense) at a lower grade because some position classifiers read the same words differently than others.

There is evidence in the record (finding 22) that most of the trial attorneys representing the Government before the ASBCA are in grade GS-14. Two of the ones at AFLC to which plaintiffs directly refer, are at grade GS-15 and they too are under the supervision of others.[13] Acknowledging, arguendo, that plaintiffs are not entitled to the grade (GS-15) reserved for the civilian trial attorneys handling the most difficult appeals at AFLC, it does not follow that they should be assigned grade GS-13. That grade is reserved at AFLC for the single trial attorney handling the easiest cases, and who acts under both administrative and professional supervision. At DPSC, cases of all degrees of difficulty are assigned to plaintiffs, and they function under the most general supervision. The grade GS-14 they seek in their petition is reserved at AFLC for trial attorneys whose cases are screened, the most difficult being assigned to the GS-15 attorneys.

Defendant has proffered evidence in affidavit form to the effect that there is a difference in the degree of difficulty of work performd at the two locations. This affidavit suffers from the same defect as plaintiffs' affidavits stating that no such difference exists. None of the affiants has personal knowledge of the detailed work

[13] A colonel and a lieutenant colonel. *Cf. Bookman* v. *United States*, 197 Ct. Cl. 108, 113 n. 3, 115, 453 F.2d 1263, 1266 n.3, 1267 (1972).

performed by the others. The relevant evidence consists of the two comparative position descriptions at GS-14 which outline virtually identical duties and responsibilities. They establish a presumption of equality which is not overcome by any competent evidence on this record.

The screening process at AFLC suggests a difference which in fact favors plaintiffs' position. Suffice it to say that, on this record, it is probable that the GS-14 trial attorneys before the ASBCA operating out of AFLC and these plaintiffs at DPSC could be interchanged, and handle one another's cases with equal difficulty or facility after an initial break-in period.

Defendant urges that this court lacks jurisdiction over a case of this type. The Classification Act of 1949 [14] provides:

> It is the purpose of this chapter to provide a plan for classification of positions whereby—
>
> (1) in determining the rate of basic pay which an employee will receive—
>
> (A) the principle of equal pay for substantially equal work will be followed * * *.

The basic jurisdictional act of this court [15] states that it "shall have jurisdiction to render judgment upon any claim against the United States founded * * * upon * * * any Act of Congress * * *." A recent amendment [16] authorizes the court to "* * * as an incident of and collateral to any such judgment, issue orders directing * * * placement in appropriate duty * * * status * * * and such orders may be issued to any appropriate official of the United States."

Although the court has been aware of the limitations on its power to substitute its judgment for that of others

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[14] Ch. 782, 63 Stat. 954, codified at 5 U.S.C. § 5101 (1970).

[15] 86 Stat. 652, codified at 28 U.S.C. § 5101 (1970).

[16] Pub. L. No. 92-415.

acting in the realm of their discretion,[17] it has not hesitated to do so where the exercise of discretion being reviewed has been arbitrary, or is unsupported by substantial evidence.[18] On the evidence in this case, it is concluded that the refusal to reclassify plaintiffs to GS-14 is arbitrary, discriminatory, and is not supported by substantial evidence.

Plaintiffs have requested both reclassification and back pay, basing the latter request on the provisions of the Back Pay Act [19] which authorizes recovery for employees who have undergone an "unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials" of the position.

It is concluded that under the literal wording of that act, plaintiffs are not entitled to back pay. The refusal heretofore to reclassify their positions has not caused either a reduction in or termination of salary or allowances such as would trigger the provisions of the Back Pay Act.

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[17] *Cf. Bookman*, note 13 *supra*. *See also Almeda* v. *United States*, 197 Ct. Cl. 81, 453 F.2d 1397 (1972); *Albert, et al.* v. *United States*, 194 Ct. Cl. 95, 437 F.2d 976 (1971); *Haynes* v. *United States*, 190 Ct. Cl. 9, 418 F.2d 1380 (1969); and *Holman* v. *United States*, 181 Ct. Cl. 1, 383 F.2d 411 (1967).

[18] *Cf. Drucker, et al.* v. *United States*, 195 Ct. Cl. 335, 451 F.2d 619 (1971); and *Nordstrom* v. *United States*, 177 Ct. Cl. 818 (1966).

[19] 5 U.S.C. § 5596 (1970).

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

> "(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period * * *."

But this court can certainly direct the reclassification of these plaintiffs. In *Drucker*,[20] decided prior to the enactment of Pub. L. 92-415,[21] the court was limited to a stay of its proceedings, affording the agency involved an opportunity to revise its action in the light of the court's opinion. The recent rounding out of the court's jurisdiction by the enactment of Pub. L. No. 92-415, permits more direct action in this case.

It is concluded that plaintiffs are entitled to an order to the appropriate official directing their reclassification to grade GS-905-14.

FINDINGS OF FACT

1. Plaintiffs Herman R. Testan and Francis L. Zarrilli are and, at all times relevant herein, were employed by defendant as trial attorneys, classified at grade GS-905-13, in the Office of Counsel, Defense Personnel Support Center (DPSC), Defense Supply Agency (DSA), Philadelphia, Pennsylvania.

2. The DPSC procures and distributes wholesale stocks of food, clothing and medical supplies to the U.S. military services worldwide, and to other authorized departments of the Federal Government.

3. Plaintiff Testan described the scope of his work as follows:

> * * * As of that date [25 January 1972] 39 appeals to the Armed Services Board of Contract Appeals were assigned to your deponent involving claims by contractors against the Government and by the Government against contractors. The claims encompassed a number of primary issues, including propriety of terminations for default, entitlement to excess repurchase costs, propriety of invocation of warranty, interpretation of contract specifications, interpretation of contract terms, delay claims based on delays due to Government acts or omissions, defective Government-furnished property claims, impossibility, equitable adjustments, shortages of Government-furnished Materials, accord and satisfaction, timeliness, defective pricing, etc. In prosecuting and defending against these claims, numerous sub-issues are involved, including excusability, waiver, estoppel, similarity of contract and repurchased items, abandonment, renegotiation, propriety of test methods and results, know-how, cost accounting, production standards, state of the art, burden of proof, etc. During the trial of these appeals, your deponent is generally required to use expert witnesses in many fields, including production engineering, mechanical engineering, chemical engineering, laboratory analysis, metallurgy, plastics, roofing, veterinary science, accounting, dairy science, food processing, law, medicine, drugs, medical equipment, weaving and finishing of textiles, embroidery, and many more. These witnesses are highly competent individuals, some having more than one college degree, and many are widely recognized for their expertise. In most of these appeals, your deponent has been and still is opposed by outstanding counsel from prominent law firms engaged primarily in the practice of procurement law, including such names as Cuneo, Kostos, Witte, Schwag, etc.
>
> 4. As of 25 January 1972 * * * the 39 appeals assigned to your depondent had a total known dollar claim value of approximately $5,215,167.00. In addition to this known amount, there is potentially a very large but undetermined dollar amount which the Government will be required to pay in six appeals should appellant establish impropriety of terminations for default, which would convert them to terminations for the convenience of the Government.

In addition, Mr. Testan stated that the total number of appeals assigned to him varied from month to month and that, during the period of December 1971 to June 1972, his assigned caseload ranged from 30 to 42 cases on representative days. The number of appeals tried be-

[20] Note 18 *supra*.

[21] *See* text at note 16 *supra*.

fore the ASBCA also varied. In 1970 seven appeals were tried; in 1971, 18. Appeals either being tried or scheduled for trial in 1972 numbered six and Mr. Testan anticipated six for 1973 at the time of his statement. Although the duration of the individual appeals varied, Mr. Testan also stated that the average length was approximately 1 week. He descriped a then current trial which had been in session, at the date of his statement, for 5 weeks and he anticipated an additional 4 weeks of trial in that case.

4. Plaintiffs' positions are subject to classification under GS-905-0, entitled "General Attorney Series." The method of evaluation for nonsupervisory attorney positions is stated to be as follows:

> There are a number of elements which together determine the difficulty and responsibility of attorney positions. These elements fall into two main categories (or factors): (1) *nature of the case or legal problem* and (2) *level of responsibility.* While there is some relationship between these two factors, each one is measured separately to recognize the fact that they do not necessarily appear in attorney position in proportionate degrees. For example, an attorney may be involved in a high-level legal case or problem, but his degree of responsibility may be limited. Conversely an attorney may be involved in a relatively routine legal case or problem, but he may be operating with a high degree of responsibility. The level assigned to one factor together with the level assigned to the other factor will determine the grade of the position according to the conversion table at the end of the standard.
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> * * * *
>
> (1) *Nature of the case or legal problem.* This factor incorporates all those elements in a case or a problem which tend to make it more or less difficult to resolve satisfactorily. These elements measure the inherent difficulty of the legal and factual questions involved in a case or problem, as distinguished from the nature or extent of the individual's responsibilities for resolving the problem, the supervision he receives, extent of significant personal contacts, or any other performance element.
>
> Among the elements are such things as the *complexity of legal and factual issues.* This element is obviously a key one, i.e., the more complex the legal or factual issues—the more difficult the resolution of the case. A byproduct of a complex legal or factual issue is often the negotiation and preparation of a complex contract or other legal document.
>
> The *impact of the case or problem* (in economic, social, or political terms) on the public, on relations with State or local governments, on national defense, on foreign relations, on private interests, or on agency authority, operations, procedures, or practices, is also an important consideration in evaluating the nature of the case or legal problem. When a legal matter materially affects any of the foregoing the consequences of the legal advice or decision may be far reaching and the damage which can be inflicted on the parties concerned or on the Government's prestige is often irreparable.
>
> The *importance of the case or legal action as legal or administrative precedent* is very significant. In the vast area of administrative law, agency actions cumulatively reflects policies and trends. When a precedent-setting situation arises it can easily undo something which has taken years to attain. Often a relatively uncomplicated situation can become a test case of extreme importance to a Government agency or non-Government interested groups. Precedent-making cases or actions make for responsible legal endeavor whether or not large amounts of money or complex legal or factual issues are involved. To measure the significance of a precedent case or action it is necessary to consider it in relation to the significance of its consequences. Consideration of the precedent in terms of the element, *impact of the case or problem* (in economic, social, or political terms), is required.

The *nature of the competition* encountered may be significant. Just as in an athletic event, the tougher the competition—the tougher the contest. Usually, tough competition is an indication that something important is at stake—whether it be money, a precedent in the making, or some other important consideration.

The *nature and availability of precedent decisions* is another important constituent of the factor, *nature of the case or legal problem.* If precedents are clear cut and plentiful, the attorney's job is ordinarily relatively simple. When precedents are few or conflicting, his job is more difficult.

Occasionally the *delicateness of the problem* becomes an all-important consideration in evaluating the nature of the case or legal problem. What might ordinarily be an uncomplicated legal or factual situation, with no foreseeable precedent-setting value, may develop into a very delicate matter which could possibly embarrass public officials or the Government in the eyes of officials of a foreign government.

Public interest in a particular legal matter has an effect on the nature of the case or legal problem as does the delicateness element. No matter how routine a situation may be, it becomes a difficult one to resolve when public interest is great.

Money is another element which may have a significant effect on certain legal cases or problems. The review, preparation, and negotiation of contracts and other legal documents, the conduct of hearings and trials, the giving of advice to administrators, the review and preparation of drafts of legislation, and any other attorney endeavor will generally require special care and attention when a large amount of money is involved, unless the case or problem is otherwise routine (e.g., review of a standard form contract). Also, not all legal matters involve money nor can they be equated to money terms. Such matters are evaluated in light of other elements.

* * * *

These elements are not independent of one another. For example, the economic, political, or social impact of a case cannot be considered apart from its importance as a legal or administrative precedent. If a case is precedent setting, its impact in any of these terms is compounded. Likewise, a case that involves a considerable amount of money or materially affects a significant segment of private and public interests is apt to be strongly contested or negotiated by highly competent legal counsel. On the other hand, less emphasis ordinarily should be given to these elements of impact when the legal questions are clearly drawn and covered by clearly applicable precedents. Therefore, the interrelationship of these elements must be considered in evaluting the nature of the case or legal problem.

* * * *

Many (if not most) attorneys are engaged in the business of *preventing* litigation or other legal problems from developing, rather than resolving them once they have developed. In these situations, such elements as impact or public interest are not as apparent as they would have been had a problem arisen. However, positions involved in preventive legal work are credited similarly to those positions involved in resolving the problems, i.e., those elements of the nature of the case or legal problem which are not manifest, as a result of the preventive action, should be credited as they would have been if the situation had attained major proportions.

* * * *

Unless the word "case" can be seen from the content to mean formal litigation, the words "case" and "legal problem" are used herein in their generic sense and encompass any legal assignment performed by an attorney whether it be of a formal or informal nature.

* * * *

(2) *Level of responsibility*—This factor incorporates all those elements which are indicative of the level at which an attorney carries out his assignment. The factor includes the functions performed, the supervision and guidance received, the personal work contacts, and the nature and scope of recommendations and decisions.

The level of *functions* performed provides perspective to the level of responsibility factor. It reflects the maturity level of the attorney's endeavors in terms of what he does in connection with a case or legal problem. This element includes functions involved in trial, advisory, hearing, and legislative work. Each of these functions has parallel types of responsibilities, contacts, recommendations, and decisions depicted at the various intensity levels of this factor.

In some instances an attorney may lay the groundwork for presentation of the Government's case, but the actual trial is conducted by another attorney. In determining the level of trial work represented by the attorney who prepared the case, the extent of his participation is weighed. If he lays the complete groundwork for the Government's case, his position is credited as it would have been had he personally tried the case. In short, trying a case is not inherently more difficult than preparing the same case for trial or vice versa.

Many Justice Department attorneys (and attorneys in other agencies responsible for the conduct of litigation in Federal courts) are responsible for considering, among other things, whether a matter is of sufficient importance to warrant prosecution; whether there is adequate evidence; and whether prosecution is likely to affect adversely other cases which may have originated in different agencies and are pending decision by the courts. These are considerations which can be credited only to the Justice Department attorney positions and to attorney positions in other agencies responsible for the conduct of litigation in Federal courts.

Supervision and guidance received is another element necessary in evaluating the attorney's level of responsibility. With more or less supervision and guidance the attorney's responsibilities decrease or increase as the case may be. The attorney who is given a problem to resolve with no accompanying instructions obviously has a greater degree of responsibility than another attorney who is given a similar problem with detailed instruction as to what to do and how to do it.

The *personal work contacts* element is another reflector of the attorney's level of responsibility. Other things being equal, the more important his contacts—the greater his responsibilities. For example, an attorney who presents his agency's view to a congressional committee has a greater degree of responsibility than an attorney who presents a similar explanation to his counterpart attorney in another agency. Many attorneys, however, while performing very difficult and important work, do not have need to contact persons other than their immediate associates. Positions of attorneys performing these noncontract functions are not to be penalized if they have the other characteristics of a particular level of responsibility.

The *nature and scope of recommendations and decisions* is again an element which indicates the level of an attorney's responsibility. The more important and authoritative his recommendations and decisions—the greater his degree of responsibility. An attorney rendering substantive advice on the terms of a contract has a gerater degree of responsibility than an attorney reviewing the same contract for legal sufficiency and inclusiveness of the language.

* * * *

Three levels of intensity are described for each of the two basic factors. With respect to factor 1, nature of the case or legal problem, the three levels describe what could be classed *simple*, *difficult* and *most difficult* cases or legal problems. These levels

are intended to cover the full range of cases or problems. If a case or problem does not satisfy the requirements indicated for the level of one of the types, it is identified with the next lower type because each type is described in terms of the minimum characteristics of the range of difficulty it represents.

The three ranges of difficulty or importance for nature of the case or legal problem represent the span of difficulty or importance of attorney work throughout the Federal Government. They are *not* intended to represent a span of difficulty or importance of attorney work found in every agency. Some agencies will not have cases or legal problems of the nature described in the third range.

With respect to factor 2, level of responsibility, the three levels cover what may be described as the *beginning*, the *intermediate*, and the *senior* attorney levels. The levels are labeled (A), (C), and (E), in recognition of the fact that there are positions that fall between these (described) levels. These intervening levels are represented by omitted letters (B) and (D). Unlike the levels described for nature of the case or legal problems, which are described in terms of minimum characteristics, these levels are described in terms of *typical* characteristics. Accordingly the intervening level (B) is appropriate when, for example, a position *compares with* level (A) in some respects and level (C) in others. The intervening level is also appropriate when a position *falls clearly between* two of the levels described with respect to the majority of elements. Unlike the type III level of factor 1, level E is not intended to be inclusive of the highest level of responsibility of nonsupervisory attorney positions.

The grade of an attorney position is determined on the basis of the combination of the highest factor levels which are representative of the position to a significant extent.

A grade-level conversion chart is provided showing how combinations of the two factors (*nature of the case or legal problem and level of responsibility*) convert to grade levels. The conversion chart includes the intervening levels (B) and (D), as well as the described levels (A), (C), and (E), for the *level of responsibility* factor.

* * * *

THE USE OF EXAMPLES TO ILLUSTRATE LEVELS

In the description of levels for the two factors, in some instances, illustrative examples of difficulty and responsibility are included. These examples are illustrative only and are not intended to be all inclusive. They are to be used only as guides in classifying attorney positions. In other words, the absence, from a given level, of a specific example, does not preclude the use of that level (if it is otherwise appropriate) in the evaluation of a position.

VARIETY

Variety has not been used as a separate element in this standard, since many attorney positions are inherently varied. In smaller organizations particularly, attorney positions may encompass a range of subjects and activities. Accordingly, at the various degree levels of the standard, work examples are cited which are illustrative of positions involving variety.

1. *NATURE OF CASES OR LEGAL PROBLEMS*

Type I

Legal work of this type is characterized by the following features:

(1) The legal question or factual situation can be relatively easily resolved in the light of the well-established or easily de-

terminable facts and clearly applicable precedents involved

(2) The impact of cases or legal problems is local, or limited to the parties directly concerned (private individuals or a local industry) since legal or administrative sanctions, fines, or penalties are relatively minor and involve no new precedents of wider potential impact.

(3) Relatively limited sums of money are involved (e.g., a few thousand dollars). The cases have no widespread social or political impact. For example, where industry practices are involved no major effect on the industry can result from the decision. There is limited public interest in the case or legal problem.

Type II

Legal work of this type is characterized by *one* or more of the following features:

(1) Different legal or factual questions are involved because of the absence of clearly applicable precedents due to the newness of the program or the novelty of the issue; or it is highly arguable which precedents are applicable to the case at issue because of the complexity of the facts or the different possible constructions which may be placed on either the facts or the laws and precedents involved.

(2) The impact of the case or legal problem affects, economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests (e.g., a large corporation, a large labor group, the residents of a large geographical region of the United States as in a large public works project, a large grant-in-aid program, a nationally organized professional group, the producers of a given farm commodity, the manufacturers of a given product, a class of Government contractors, i.e., suppliers of a particular service or product, or an important program of a Government agency). Also included in this type are cases or legal problems which have an impact on relations between the United States and foreign governments (e.g., acts by servicemen or other representatives of the United States stationed abroad, questions such as whether or not to buy foreign or American products, or negotiating and drafting consular conventions) and which must be handled with great care.

(3) Large sums of money are directly or indirectly involved (e.g., about one hundred thousand dollars), or there is considerable interest from a significant segment of the population (see paragraph 2 above), or the case is strongly contested in formal hearings or informal negotiations by the private individuals, corporations, or Government agencies involved.

Type III

Legal work at this level is characterized by *one* or more of the following features:

(1) Extremely complex and difficult legal questions or factual issues are involved in the drafting, interpretation, or application of legislation, regulations, contracts, orders, decisions, opinions, or other legal instruments and require for their solution a high order of original and creative legal endeavor in order to obtain a reasonable balance of conflicting interests (e.g., legal work involved with balancing the requirements of national security with individual liberties, determining the

legality of State and local taxation of the use of Federal Government property by private business firms, recommending or making policy concerning consent decrees in antitrust litigation, or legal work involved in developing material for Executive orders concerning the use of Federal troops in a domestic emergency); or complex factual or policy issues are involved requiring extensive research, analysis, and obtaining and evaluating of expert testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical areas.

(2) The case or problem is such that it can have the effect of substantially broadening or restricting the activities of an agency (e.g., the enforcement of antitrust and trade regulations, tax laws, food and drug laws, or the laws governing securities transactions); or it has an important impact on a major industry whose economic position affects the health and stability of the general economy (e.g., a merger or reorganization involving a basic industry, or on the rates, practices, or competitive position of a major industry, for example, the position of the railroads in relation to the motor carriers based on the "reasonableness" of their respective rates, or the position of domestic airlines operating overseas in relation to restrictions on foreign airlines operation in this country). It has an important impact on major private or public interests (e.g., a substantial broadening or restriction of benefits to veterans under the law, amounting to many millions of dollars annually, or a major extension or revision in a State

and/or other grant program or a nationwide retirement system, the development of administrative regulations of such scope as the Armed Services Procurement Regulation, a substantial question of civil rights involving the due process clause, or a statement defining the legal rights of the Four Powers with respect to Berlin). Also included in this type are problems of unusual delicacy, such as fraud cases, because of the serious consequence of error and the great burden of proof assumed by the Government.

(3) Cases or problems of this type frequently involve, directly or indirectly, very large sums of money (e.g., about a million dollars) and/or they are frequently vigorously contested by extremely capable legal talent (e.g., a major antitrust case). Interest in these cases is generally nationwide.

2. *LEVEL OF RESPONSIBILITY*

Level A

Nature of functions

This level is characterized by functions, examples of which are listed below.

Searches case reports, legal documents, periodicals, and textbooks; and prepares tentative drafts of letters, memoranda, and legal documents for use by higher-grade attorneys in the preparation of opinions, legislative reports, briefs, contracts, and other papers or legal documents (i.e., particular points of law as decided in previous cases; background information and legal references as a basis for advising on management plans and policies, compilation of legal issues and legislative history in connection with pending legislation).

Assists the attorney in charge of a court case or an administrative proceeding by interviewing and select-

ing appropriate witnesses, preparing them to give testimony, conducting direct examination, suggesting questions to be asked in cross-examination, cross-examining witnesses after the line of questioning has been settled, and drafting findings of fact, conclusions-of-law, and orders based upon the record.

Prepares cases for filing by drafting complaint, order to show cause, indictment, preliminary motions, and supporting affidavits and briefs.

Prepares drafts of pleadings, motions, and interrogatories in connection with cases in litigation.

Conducts investigations of limited scope to obtain facts, studies legal precedents, and prepares recommendations for review of a supervisor.

Supervision and guidance received

Legal research is performed in accordance with preliminary instructions as to methods of approach, source material available, and policy and precedent of the office.

Participation in hearings is limited to examination or cross-examination where the line of questioning has been carefully laid down by the attorney in charge of the case and where the issues with respect to the points to which the particular witness is expected to testify are well defined and narrow in scope.

Completed written work is thoroughly reviewed usually by an attorney of higher grade who points out errors, omissions, and inadequacies, and corrects or directs the incumbent to correct them.

Personal work contacts

Personal work contacts constitute a relatively minor element at this level. The most important contacts are those involved in fact gathering. Contacts initiated by the incumbent are principally in obtaining information and/or legal references pertinent to the problem under study, and interviewing prospective witnesses, claimants, or other persons having knowledge of the facts involved in the problem or the case. As experience is gained, may advise agency personnel on minor matters or may participate in hearings or trials through examining witnesses along lines of inquiry laid down by an attorney of higher grade level.

Attendance at conferences with representatives of other agencies, industry, State and local governments, higher administrative officials, or congressional committees and their staffs is largely as an observer to gain experience.

Nature and scope of recommendations and decisions

The incumbents are responsible for the accuracy of factual information and legal citations, which are incorporated in the decisions, opinions, briefs, and other legal documents prepared by attorneys of higher grade level. Legal opinions, analyses, and conclusions ordinarily are not expected to be in finished form (except for relatively routine legal correspondence).

Level C

Nature of functions

This level is characterized by functions, examples of which are listed below.

Conducting legal research in connection with:

(1) Cases pending administrative hearings, trial before courts of original jurisdiction, or argument in appellate courts.
(2) Legal questions referred by administrative officials of the employing agency, such as questions concerning the interpretation and application of statutes, rules, and regulations as they pertain to contracts, claims, or other legal instruments involving private business, State, local, national, or foreign matters.
(3) Questions regarding the effects of provisions of proposed legislation or proposed changes in agency policies or regulations.

Where further development of facts is needed, refers question back to originating organization, to the operating organization affected by a proposal, or to the investi-

gating arm of the employing agency, indicating the precise nature of information required. In criminal cases may recommend a grand jury investigation.

In some situations, personally conducts research or investigation of the facts as well as the laws, regulations, and legal precedents. Such research or investigation may involve any of the following:

(1) Analyzing the factual and legal issues presented to determine what further facts are needed and what legal sources are applicable.
(2) Reviewing policies, procedures, regulations, technical manuals, and other agency publications.
(3) Studying industry and trade practices; policies, procedures, and operations of other Government agencies or of the States or local bodies; or business, technical, and professional publications and other authoritative sources of information required in the technical interpretation of factual issues.
(4) Conducting research of laws, legal opinions, policies, regulations, legal texts, and precedent cases bearing on the legal issues involved in the problem, proposal, or case.
(5) Conducting pretrial examination of witnesses, or —in the performance of advisory services or legislative review—interviewing operating officials, industry spokesmen, and other interested persons to complete the background investigation.
(6) Preparing memoranda or reports outlining the facts and legal issues, analyzing the factual and legal issues involved, explaining the application of legal principles and precedents, and justifying recommendations or conclusions.

On the basis of the research or investigation, prepares necessary legal documents, advisory opinions for administrative personnel, drafts or comments on proposed legislation or changes in regulations, or recommendations on the advisability of instituting a civil or criminal suit, an administrative hearing, or other disposition.

When litigation is undertaken, prepares and/or presents, or provides technical guidance during, the prosecution of the Government's or the agency's case in an administrative hearing, before a court of original jurisdiction or appellate court. Prepares charges, show cause orders, complaints, briefs, motions, and other documents preparatory or incident to the trial of the case.

Participates in pretrial or prehearing conferences, examines and cross-examines witnesses, argues motions before the court or hearing officer, and summarizes the Government's or the agency's case.

When the activities of the agency require entering into contractual relations, negotiates (usually as a member of a team) with the representatives of private business or of State, local, or foreign governments, and drafts the necessary contracts and other legal documents.

Examines formal filings for legal sufficiency and full disclosure required to be made by statutes, rules, and regulations. Conducts or participates in conferences with legal counsel of registrant, or reviews opinions of counsel as to meeting filing requirements. Conducts any investigation and any subsequent administrative proceedings in connection with such matters.

Some of the functions enumerated above may be delegated to attorneys of lower grade level, who work under the guidance of the incumbent.

Also characteristic of this level are such duties as examining petitioners, claimants, and defendants against charges brought under the administrative regulations of any agency; and preparing reports, exhibits, and legal memoranda from the records and hearings, outlining the factual and legal issues and the recommendation for disposition of the case for the consideration of quasi-judicial officers or bodies, or the courts.

Acts regularly as the legal adviser on the plans and operations of a single program or activity, characterized usually as a distinct entity with separate, identifiable operations, authorized by law to accomplish a specific purpose (e.g., child health, school assistance in federally affected areas, interstate quarantine) but included in a group of related programs. May also serve as the as-

signed specialist on a single program or a major phase of several related programs or major activities.

Reviews for legal soundness and accuracy program material emanating from operating units of the organization.

In cases of sufficient scope and complexity to require the services of a staff of several attorneys or other specialists to present the Government's case or position, has responsibility for conducting *a phase* of the trial or other type legal problem under the guidance of the attorney in charge.

Supervision and guidance received

Incumbents of positions at this level of performance are expected independently to plan, organize, and conduct studies of the mill run of legal problems, cases, or legislative proposals encountered in their respective programs. They are apprised of any unusual circumstances surrounding the case or the problem, any background information which must be considered, and any important policy considerations that will govern development of the case or the solution.

Beyond this, they normally work independently in investigating the facts, searching legal precedents, defining the legal and factual issues, drafting the necessary legal documents, and developing conclusions and recommendations.

Completed work is normally assumed to be accurate with respect to legal citations, treatment of facts, and other aspects of technical treatment. However, all written work is subject to review for soundness of approach and argument, application of legal principles, and consistency with governing policies, procedures, and regulations of the employing agency.

Before a case is presented in an administrative hearing or before a court, the supervisor discusses the presentation, the line of approach, the possible lines of opposition to be encountered, and other aspects of the case to insure that proper groundwork has been laid for successful prosecution of the case.

Personal work contacts

Generally, personal work contacts are an important characteristic of this level. Effectiveness is required in presentation, exposition, and argument in presenting cases to administrative hearings and to courts.

Attorneys participate in pretrial or prehearing conferences with industry representatives or private citizen claimants, defendants, or petitioners and their attorneys, explain points of law, charges, or qualifications of claimants, and refer suggested settlements or compromise offers to superiors with appropriate recommendations.

They advise negotiating officials in legal contractual matters by recommending appropriate clauses, provisions, and general wording.

Also characteristic of this level is participation in conferences with representatives of operating programs, State and local governments, industry, private organizations (e.g., veterans organizations, professional associations), or other Government agencies in developing or evaluating proposed changes in legislation or agency policies or regulations.

Incumbents participate in negotiations concerning conflicts in State and Federal regulations with State officials.

Incumbents assist the staffs of congressional committees in technical drafting of legislation.

Nature and scope of recommendations and decisions

Recommendations to those outside the agency or to administrative officials at higher levels are normally made through the supervisor. Examples of recommendations characteristic of this level include:

(1) Whether to initiate criminal or civil suits against alleged violators of Federal laws and regulations.
(2) Settlement of claims against the Government brought by private citizens.
(3) The organization, order of presentation, and line of argument to be used in the presentation of cases or hearings delegated to the incumbent as the trial attorney.

(4) Settlement of suits brought by the government against others (e.g., offers in compromise in income tax cases).
(5) Replies to requests for legal advice or interpretations of law arising out of the day-to-day operations of agency programs.
(6) Substantive changes in legislation and agency policies or regulations to make them more equitable, responsive to needs, or easier to administer.
(7) Whether to approve a contract or other legal document in its proposed form and content.

Level E

Nature of functions

This level is characterized by functions, examples of which are described below.

Reviews cases for agencies responsible for the conduct of litigation in Federal courts to determine whether to recommend prosecution. Considers the weight of the evidence, the importance of the case, the necessity of uniform application of the law throughout the land, the cost of litigation, and other considerations which bear on the advisability of instituting suit. Prepares a memorandum of fact and law and recommends whether prosecution should be undertaken. Generally, the memorandum is submitted directly to the individual responsible for authorizing formal legal action. If prosecution is authorized, initiates the filing of papers with the appropriate court, prepares and tries the case, or prepares the case for trial by another attorney. If the case is assigned to another attorney for trial, may advise and assist him. This assistance may extend to active participation in the presentation of the case, preparing witnesses, examining and cross-examining witnesses, and consulting with the trial attorney with respect to the line of argument.

Reviews, for agencies responsible for appellate litigation, records of suits for or against the Government in which the decision was unfavorable to the Government to determine whether to recommend appeal to a higher court. Considers the effect of the decision as a precedent

if allowed to stand, the weight of the evidence, the need for consistent application of the law in all jurisdictions, the amount of money involved, the cost of litigation, and other considerations bearing on the advisability of appeal. If appeal is recommended, and the recommendation approved, may prepare and/or present the Government's case before the appellate court.

Drafts legislation or prepares complete reports on changes in basic legislation. Drafts or receives proposed legislation and refers to organizations having jurisdictions over programs which would be affected by the proposed changes in law. Evaluates the proposed legislation in terms of its foreseeable effect on agency programs, policies, procedures, regulations, methods of operation, and extent of operation, and on existing legislation. This evaluation is based on an analysis of the comments of operating organizations, the incumbent's own program knowledge, his awareness of the legal implications of the proposed legislation, and his knowledge of related legislation. Similar functions are performed with respect to the formulation and/or coordination of treaties or other international agreements or of rules, regulations, or policies applicable to major programs of the agency.

At the highest level of drafting or reviewing proposed agency decisions, analyzes the records, including transcription of testimony and pleadings, evaluates facts, determines questions of law, and either recommends adoption of a decision prepared by another attorney or drafts his own decision for consideration and adoption by agency officials who exercise final authority in such matters. This does not preclude the use of this level for positions at subordinate organizational echelons if, in fact, the drafting or reviewing of proposed agency decisions at such echelons is independently done, is directly submitted (with no further technical review) to agency officials who exercise final authority, and is given weight and effect equal to the recommendations of incumbents of positions at the highest agency level of drafting or review.

Acts as principal attorney in charge of the preparation and presentation of cases before administrative tribunals or before the trial or appellate courts, where the cases (a) are of such scope that they may, in many instances, warrant the assistance of one or more attorneys of lower grade or other specialists and (b) are of such importance that they frequently involve matching professional skills against some of the most distinguished and highly paid legal talent in the country. The principal attorney exercises full responsibility for the development and presentation of the case.

Acts as principal attorney in charge of recommending the policies and developing the procedures and regulations implementing new or amended legislation (e.g., new or revised grant-in-aid programs) for the employing agency. Is responsible for insuring that these policies, procedures, and regulations are consistent with the intent of the law and are administratively sound, efficient, and economical in operation. In developing the details of operations considers the needs, desires, and attitudes of administrators, State and local officials, industry representatives, the general public, or others who may be affected by the new or revised program.

Acts as legal counsel to the head of a major operating program of the department or agency (e.g., a bureau, command, technical service, or regional office or field installation when the field installation has been delegated unusual authority or authority commonly of a higher echelon). Is responsible for advising on questions of law or administrative policy involved in the operations of the organization and in its contacts with industry, private and professional associations, State, local, or foreign government, or the general public. Advises on laws, regulations (including those who have the effect of law) of his own and other Federal agencies, opinions of the Comptroller General or the agency's general counsel, common law, administrative law, etc. Answers questions which are covered by interpretations of the Comptroller General or other legal authority. Is responsible for recognizing those questions which require an interpretation by such legal authority. Prepares recommended interpretation outlining the facts and the applicable law. Is responsible for developing the material which, in effect, becomes the agency's justification for the conduct of litigation on behalf of the agency by a litigating agency.

Sits as a quasi-judicial officer hearing cases involving claims against the Government, complaints, or requests for relief from the provisions of agency regulations which have the effect of law; conducting investigative hearings pursuant to statutory provisions to establish a formal written record; hearing charges brought by the Government against violators of provisions of law or regulations; or hearing cases arising under the disputes clause of a government contract. Renders decisions on the points of law or constructions of fact in dispute and directs corrective action, payment of claim, or discretionary relief depending on the merits of the case and the penalties and permissible relief under law and regulations.

Supervision and guidance received

Attorneys at this level are expected to carry out any assignments within their area of responsibility without preliminary instruction. At the time an assignment is made the supervisor may discuss the significance of the problem and give any background information received. From this point, the incumbent independently conducts the investigation or negotiation, plans the approach, and develops the completed decision, report, brief, opinion, contract, or other product; or represents the Government at the conference, hearing, or trial. Where a hearing or trial is involved, the supervisor may be briefed on the overall approach to be taken and the line of argument to be pursued, especially where an important precedent effect is anticipated or there is widespread public interest in the outcome. Completed work in the advisory or legislative and regulatory areas is reviewed before it is signed out for consistency with agency policy, for possible precedent effect, and for overall effectiveness.

Personal work contacts

This level is characterized by the most responsible personal contacts, examples of which include:

(1) Conferring or negotiating with top administrative personnel in the agency, private business, or State, local, or foreign governments on important legal and policy questions.
(2) Advising and assisting congressional committees and their staffs in drafting legislation or giving expert testimony before congressional hearings on legislative proposals.
(3) Trying cases before courts or administrative bodies.

Nature and scope of recommendations and decisions

Recommendations characteristic of this level are similar to those characteristic of level (C). The major difference is that at this level advice on the interpretation of law or on proposed changes in legislation, policy, and regulations is often given directly to heads of programs, bureau chiefs, cabinet officers, congressmen, or representatives of State and local governments. In some instances recommendations are made through supervisors, as at level (C), but these recommendations are usually tantamount to final decision. This is particularly pertinent to positions concerned with recommending whether to prosecute cases or to appeal adverse decisions in agencies responsible for litigation.

Incumbents are responsible for recognizing when the matter under discussion is of such precedent-setting nature or of such importance or delicacy that his advice must be cleared with superiors before it is given out.

Attorneys at this level often deal with matters of such scope and complexity that they require the concentrated efforts of several attorneys or other specialists. In such circumstances attorneys at this level are normally responsible for directing, coordinating, and reviewing the work of the team.

GRADE-LEVEL CONVERSION CHART

Nature of Cases or Legal Problems	*Level of Responsibility*	*Grade*
TYPE I	A	*
	B	9
	C	11
	D	12
TYPE II	A	9
	B	11
	C	12
	D	13
	E	14
TYPE III	A	11
	B	12
	C	13
	D	14
	E	15

5. The position description portraying plaintiffs' duties as trial attorneys GS-905-13, is as follows:

JOB SUMMARY

Serves as Trial Attorney in connection with appeals before the Armed Services Board of Contract Appeals (ASBCA) of the Department of Defense which arise under the contracts at DPSC. Appeals to the ASBCA are from Contracting Officers' decisions involving disputes arising as a result of claims by the contractor or the Government in connection with the performance or termination of contracts, as, for example, additional costs incurred by the contractor in being furnished defective Government material; additional costs incurred by delays resulting in stoppage or slowdown of production; additional costs or savings involved in defects in or changes of specifications; controversial interpretations of contract provisions; termination of contracts for the convenience of the Government; excusability of delays giving rise to termination of contracts for

default; etc. Utilizes a specialized knowledge of Government contract law in performance of job.

JOB CONTROLS

Receives general supervision from Chief Trial Attorney which includes assignment of cases, discussion, conferences and information as to new or revised policies, discussion of unusual and complex problems; incumbent functions independently during progress of assignments with full technical responsibility and wide latitude of discretion. Review is made of contemplated actions as required for adherence to established policy and/or need for additional legal theory.

MAJOR DUTIES

1. *Prepares appeal action for trial and presents before the Armed Services Board of Contract Appeals*: Assembles and analyzes complete claims files which are involved in actions brought by or against the Government (Contract, GFP, Inspection, Laboratory, Fiscal); studies the files and defines factual and legal issues. Prepares a complete statement of all the facts in the case, including those which require further development, a statement of any difficulties encountered during administration of the contract, showing how disputes arose and were resolved, and prepares physical exhibits to substantiate the stand taken. Investigates the facts. Selects, interviews and prepares prospective witnesses, including expert witnesses for examination and cross-examination at trial; prepares statements and affidavits. Points up those facts which are most advantageous to the Government and the legal arguments which are best supported by precedent decisions, when available. Researches law; prepares and files Answer to Complaint or Memorandum in Lieu of Answer, determining what issues should be controverted, admitted, etc. Prepares and argues all

applicable motions and presents evidence in connection therewith. Prepares Trial Memorandum, opening and closing statements, citations to law and relevant documents for orderly presentation of Government's case. Forwards a copy of each Notice of Appeal, Complaint, Answer, Rule Memorandum (without inclosures), Brief, and ten days prior to date set for hearing, Trial Memorandum containing a summary of the testimony of proposed witnesses to the Counsel, DSA. Amends Answer when deemed necessary or when required by the Board. Participates in pre-hearing conferences before the Board and/or pre-hearing meetings with appellant's attorney to consider simplification of the issues, desirability of amendments of the pleadings, possibility of obtaining admissions of fact and stipulation as to admission into evidence of documents which will avoid unnecessary proof, limitation of the number of expert witnesses and such other matters as may aid in disposition of the appeal or shortening the time and expense of the trial. When deemed appropriate incumbent may move the Board for permission to serve Written Interrogatories or take Oral Depositions. Arranges with the Board, appellants and/or their attorneys for time and place of trial. Determines, when in the best interests of the Government, that a particular case should be settled and negotiates terms of the settlement, with the discussion and advice of the Chief Trial Attorney. Conducts actual trial of the case, cross-examines appellants' witnesses, when advisable, interposes objections to appellant's offers of proof when appropriate, stipulates as to facts, offers such relevant evidence as deemed advisable and admissible under the generally accepted rule of evidence applied in the Courts of the United States in non-jury trials. Studies the transcript and all exhibits; after conclusion of the trial prepares post-trial briefs and reply or rebuttal briefs when appropriate.

2. *Reviews ASBCA decision and takes necessary action as determined advisable*: Reviews all decisions

of ASBCA on appeals handled. Files a Motion for Reconsideration with ASBCA based upon determination that decision is erroneous in whole or in part after consultation with Chief Trial Attorney. If ASBCA denies the Motion or sustains its previous decision and a decision by the Comptroller General (GAO) is desired prior to payment forwards request for such a decision to the Counsel, DSA. Maintains direct contact with the ASBCA, appellants and/or their attorneys, other Governmental agencies, witnesses, etc. in all matters involving assigned appeals.

Performs other duties as assigned.

6. On December 8, 1969, a request for personnel action, SF 52, was submitted to the Office of Civilian Personnel by the Office of Counsel, DPSC, requesting reclassification of the positions of plaintiffs from grade GS-13 to grade GS-14. The forms were submitted and signed by Donnell K. Wolverton, Counsel, Chief Attorney of DPSC. Each contained the following remarks.

> Reclassification to next grade is warranted by standards set forth in the General Attorney Series, GS-905-0. Incumbent's duties and responsibilities meet the requirements of Type III of the Nature of Cases or Legal Problems and Level D of the Levels of Responsibility of said series. Furthermore, his duties and responsibilities are the same as those set forth and identified as Position M1009, Contract Appeals Division, Office of the Staff Judge Advocate, Headquarters Air Force Logistics Command, Wright-Patterson AFB, Ohio, which is classified GS-905-14 [hereinafter AFLC].

7. Supporting data was submitted at some time between the date of the request, and March 23, 1970. This data consisted of a position description for trial attorney (contract), classified as a GS-905-14 at AFLC. Also included in this data was a proposed position description for plaintiffs, corresponding closely to the AFLC position summary.

8. The position description for trial attorney (contract), level GS-905-14, AFLC, reads in pertinent part as follows:

I. INTRODUCTION:

• • • •

B. The purpose of this position is to serve as Trial Attorney for the Department of the Air Force in representing the Government in trials before the Armed Services Board of Contract Appeals involving Air Force contracts.

II. DUTIES AND RESPONSIBILITIES:

A. Reviews for legal sufficiency and furnishes legal advice on findings and decisions to be issued to contractors under Air Force contracts. (10%)

B. Prepares appeal cases for trial and hearing before the Armed Services Board of Contract Appeals. This includes the following: (1) Examination, review and study of all correspondence, contractual documents, and other pertinent documentary evidence as well as a review of all applicable laws, regulations and directives; (2) Preparation of legal opinions, all necessary written pleadings, including answers, motions, briefs, and such other legal papers as required in each case; (3) Interviewing and corresponding with witnesses, including professional and technical experts; (4) Arranging for taking of depositions of witnesses with opposing counsel including preparation of interrogatories and cross-interrogatories to be propounded to such witnesses; (5) Arranging for hearing dates with opposing counsel and for the presence of all Government witnesses at such hearings; (6) plans and develops trial techniques, tactics, legal theories and procedures to be used in the trial of each assigned case. (30%)

C. Based upon a personal evaluation of the evidence and contract provisions, determines when contract appeals cases should be settled by negotiation prior to hearing; conducts such negotiation in con-

junction with the contracting officer and prepares any necessary legal documents to effect such negotiated settlements. (15%)

D. Represents the Government during the trial of assigned appeals. This includes making opening statements, verbal stipulations, examination and cross-examination of witnesses, introduction of evidence, examination and comments on evidence proffered by the contractor, making and explaining legal basis for objections to testimony or other evidence, oral legal argument on issues and evidence, and closing statement. (30%)

E. Determines and develops post-trial procedures and prepares the Government's written brief on each assigned case. This includes consultation with such professional, engineering and other technical experts as necessary, review of the complete verbatim transcript of the case, examination of all documentary evidence, research and examination of all applicable laws, regulations and policy directives and precedent where such precedent exists, and the writing of a legal brief setting out the Government's contentions and the evidence and law supporting them. (15%)

III. CONTROLS OVER WORK:

Works under administrative supervision of the Division Chief but receives no direct professional supervision in performance of duties and responsibilities. Works independently or is assisted by technical experts or other attorneys under his guidance. Is guided by Federal and State laws and regulations, court decisions, decisions of administrative tribunals, decisions of the Comptroller General, and regulations and Directives of the Department of Defense and the Air Force in performance of duties.

• • • •

The "Substantiating Analysis" for this position, comparing the duties and responsibilities portrayed in the above position description with the standards contained

in the General Attorney Series, GS-905-0, are stated as follows:

• • • •

II. *Grade Level Determination*

By reference to the published standards for the GS-905-0 General Attorney series, the trial work for the factor, Nature of the Case, exceeds Type II and and equates to Type III in such aspects as difficulty of legal review, impact of decision and amount of money involved. Level C is exceeded in the nature of functions and supervision and guidance received and Level E is appropriate. Personal work contacts and nature and scope of recommendations equates to Level C. Level D, accordingly, is selected as being most typical of the level of responsibility.

III. *Classification Conclusion*

Type III, Level D equates to GS-14 on the grade-level conversion chart. Position is, therefore, classified as Trial Attorney (Contract) GS-905-14.

• • • •

Evaluation of Grade Level

A. Nature of the Case or Legal Problem

The attached position is characterized by the following features of the attached description and is, therefore, of Type III. Preparation and drafting without instruction and supervision of opinions and legal instruments which involve complex factual and/or policy issues requiring extensive research, analysis, obtaining and evaluating expert testimony in controversial areas, i.e., scientific, engineer and financial fields. The cases and problems encountered may have the effect of substantially broadening or restricting the procurement activities of the United States Air Force. Further, the contractors are usually represented by leading attorneys who are extremely capable and who vigorously protest the position taken by the Government as represented by the Trial Attorney.

B. Level of Responsibility

The level of responsibility for this position is D and characterized by functions described in detail in the attached Job Description but consists essentially of:

(1) Acting as principal attorney in charge of the preparation and presentation of cases before the ASBCA and, in many instances, has the assistance of other attorneys of lower grades or other specialists.
(2) Opposing some of the most distinguished and highly paid attorneys in the country.
(3) The Trial Attorney's recommendations are frequently tantamount to final decisions as to whether to prosecute or settle Appeals.

Accordingly, the position is classified as Trial Attorney (Contract) GS-905-14.

9. On March 23, 1970, the Office of Civilian Personnel (OCP) of DPSC requested additional information concerning, primarily, substantiation for the requested type III classification for plaintiffs. In particular, the OCP requested "2 or 3 examples (for each employee) citing and describing specifically the unusual complexities attributed to Type III cases in terms of Attorney standard's criteria." The elements mentioned were:

(1) Complexity of legal and factual issues
(2) Impact of the case or problem (in economic, social, or political terms) on the public, on relations with . . . governments, . . . or agency . . . operations . . . etc.
(3) Importance of the case or legal action as legal or administrative precedent
(4) Nature of the competition encountered
(5) Nature and availability of precedent decisions
(6) Delicateness of the problem
(7) Public Interest
(8) Money

In addition, information concerning the supervisory relationship of the two trial attorneys and the present supervisor was requested.

10. In response, Mr. Wolverton, Chief Attorney of DPSC, supplied examples of cases handled by both plaintiffs and the following statement concerning the relationship between plaintiffs and their supervisor:

a. The senior trial attorney serves as the coordinating member of the trial section. His responsibility is to assure that current agency policy is followed at all times, that progress is being made in all cases, and that a monthly status report of assigned cases is kept current.

b. Assignment of cases by the senior trial attorney is on a random basis dictated by the workload of each trial attorney, including the senior trial attorney. The complexities of new cases are not analyzed, therefore not fully appreciated, until the assigned trial attorney has studied the complete file. Once a case is assigned to a trial attorney, including the senior trial attorney, it becomes his responsibility to sift pertinent facts, develop a theory of the case, plan strategy, and shepherd the case to its ultimate conclusion. The three trial attorneys confer with each other from time to time to discuss unique aspects of their cases, and to exchange views on strategy and application of current case decisions. While this mutual exchange of views and experience is intended for possible application to assigned cases, final judgments are left to the individual trial attorney.

11. Between April 20 and May 4, 1970, Regina B. Graham, a position classification specialist at DPSC, conducted an audit of the positions of Messrs. Testan and Zarrilli as part of her duties in making recommendations relating to grade level assignments of GS-13 and above. As part of this investigation, the employees were interviewed, discussions with their supervisor, Oscar Moldawer, were held, and one hearing was observed. She concluded that the cases submitted as examples of

plaintiffs' workload in question were properly classified as GS-13.

12. On May 8, 1970, James J. D'Angelillio, Director, OCP, DPSC, confirmed the opinion that the positions of both plaintiffs "appropriately evaluate to the GS-13 level." His opinion states, in pertinent part:

> 2. The Attorney Standards take into consideration two major evaluation factors: (I) Nature of Cases or Legal Problems, and (II) Level of Responsibility. The case treatment in the standard for Factor I reflects the "*minimum*" *characteristic* of the legal situation, and consequently allows for a *broad* span of difficulty within each type. The level of responsibility (Factor II) represents the typical characteristics.
>
> a. With respect to Factor I, the nature of legal cases handled by the incumbents compares favorably with characteristics reflective of Type II, in that difficult legal or factual questions are involved because of the absence of clearly applicable precedents; or it is highly arguable which precedents are applicable to the case at issue because of the complexity of the facts or the different possible constructions which may be placed on either the facts or the laws and precedents involved; the impact of the case affects economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests (e.g., the manufacturers of a given product, a class of Government contractors, i.e., suppliers of a particular service or product); large sums of money are directly or indirectly involved; or the case is strongly contested.
>
> b. The incumbents consider that the type of cases handled are such as to warrant Type III category. However, no conclusive evidence was found to support that contention. Type III cases, in fact, represent the most difficult type of attorney work situations throughout the entire Federal Government. The scope, magnitude and consequence of legal work prescribed for Type III, transcends that which could

> be recognizable in the subject positions. Even were it possible that some of the trial work might fall within the Type III category, it would necessarily have to predominate for it to be creditable from a classification standpoint.
>
> c. Level of Responsibility—The subject positions function under very general supervision of the Chief Trial Attorney who is responsible to the Counsel for overseeing and coordinating trial activities, assuring adherence to established policies, providing guidance on new legal theory, signing official transmittal of case material and correspondence, maintaining status and progress of work, rating work performance of the incumbents, and keeping Counsel informed of out-of-the-ordinary situations and/or problems warranting his attention. (The Chief Trial Attorney has been ranked at Level E). Within the framework the Trial Attorneys are ranked one level below (Level D). This level recognizes their independent development and presentation of cases and substantial freedom of operation. The combination of Type II cases and Level D responsibility equates to the GS-13 level.
>
> 3. It should be noted that the standard's criteria for the Level E category involves responsibility as the "Principal" Trial Attorney. In view of this, there would be no possibility in this size organization of recognizing or crediting this level of responsibility in more than one position. If all three positions operated on a co-equal basis—Level D would apply.

13. Plaintiffs appealed the May 8, 1970, decision to the U.S. Civil Service Commission, Philadelphia Region, by letter dated May 20, 1970. Information regarding their work was submitted at that time and also by letters dated June 19, June 22 and July 2, 1970. Included in these submissions were lists of the appeals assigned to each plaintiff with the dollar amounts in controversy, rules of the ASBCA, several board opinions on appeals in which one of the plaintiffs participated,

updated lists of assignments, and detailed descriptions of some of the appeals assigned.

14. Plaintiffs' appeals were denied by letter of July 20, 1970, from the Regional Director, U.S. Civil Service Commission, Philadelphia Region. Each letter stated, in part:

> All positions subject to the Classification law contained in Title 5, U.S. Code, must be classified in conformance with published position classification standards of the Civil Service Commission, where these exist. For this reason your position may not be classified on the basis of comparison with the particular Attorney positions in other Government installations, which were cited in your appeal.
>
> * * * *

The standard for the GS-905 series provides for evaluation of positions as to grade level by two main factors: (1) nature of the case or legal problem and (2) level of responsibility.

Our evaluation of your position using these two factors is as follows:

1. *Nature of Cases or Legal Problems*

   Your legal case work most nearly compares with Type II in the standard. A review of the appeal cases assigned you as named in your own appeal shows that in general large sums of money (e.g. about 100,000 dollars) are directly or indirectly involved in each case, as described in the standard under Type II. An aggregation of the sums of money involved in all cases assigned (approximately $3,000,000) may not be used as an evaluation criterion. Rather the sum of money involved per case is the proper criterion. For evaluation at Type III on the basis of money involved, it would be necesary that individual cases frequently involve, directly or indirectly, very large sums of money (e.g. about a million dollars). On the record this criterion does not apply.

In addition, your legal work meets other characteristics described for Type II in the standard as follows: Difficult legal or factual cases are involved because of the absence of clearly applicable precedents due to the newness of the program or the novelty of the issue; the impact of the case or legal problem affects a significant segment of private interests, for example, the manufacturers of a given product or a class of Government contractors.

Overall Type II is appropriate for this factor.

2. *Level of Responsibility*

   We have assigned Level D to this factor. The standard shows the preparation and/or presentation or providing of technical guidance in an administrative hearing before a court of original jurisdiction or appellate court, at Level C, so far as the element of "Nature of functions" is concerned. This compares to the nature of functions in your position. The "supervision received" over your position is evaluable somewhat higher than C. Your written work is not subject to the same detailed review characteristic of C; rather review is for consistency with governing policies. Neither do you receive preliminary instructions with your assignments as at C. Since you try cases before administrative bodies, your person to person contacts also exceed Degree C. Nature and scope of recommendations on the other hand do not exceed C. Overall the factor of "Level of Responsibility" is evaluable as Level D.

   Level E does not apply to your position since your supervisor is the Chief Trial Attorney and acts as the principal attorney. This responsibility is described at Level E in the standard.

By reference to the grade-level conversion chart in the standard, a combination of Type II and Level D equates to grade GS-13.

15. Plaintiffs, on July 27, 1970, requested the Philadelphia Regional Office of the Civil Service Commission to reconsider its decision of July 20 denying reclassification. Further documentation in support of this request was submitted in letters dated July 29, August 21, and October 26, 1970. The documentation included analyses of certain cases handled by both plaintiffs, statements as to the use of expert witnesses, and the job description for a trial attorney (contract) at AFLC as described in finding 8.

16. By letters dated November 13, 1970, plaintiffs were notified that their requests for reclassification were again denied by the Philadelphia Region, Civil Service Commission. Each letter stated, in pertinent part:

> We have very carefully considered the additional information presented regarding your casework and the level of your responsibility. We have determined that our original decision should be reaffirmed. Accordingly, it is our decision that the correct classification of your position is Trial Attorney, GS-905-13.
>
> Our evaluation of your work assignments in comparison with the classification standards for the Attorney Series, GS-905, follows:
>
> 1. *Nature of Cases or Legal Problems*
>
> We find that for the most part your cases are characterized by or compare favorably with one or more of the features identified as Type II in the standard. We cited Type II features in our original decision.
>
> Characteristically, Type III cases have an important impact on major private or public interests, e.g., the development of administrative regulations of the scope of the Armed Services Regulations. Also, Type III are cases characterized by the complex factual or policy issues involved requiring extensive research, analysis, and obtaining and evaluating of expert testimony in controversial areas of scientific, medi-

> cal, engineering, or other highly technical areas. We have evaluated only the Ketchum Laboratories case as fully meeting the criteria above for a Type III case from among the typical examples of your work presented as being your assignments as of April 1970.
>
> The standard provides that if a case or problem does not satisfy the requirements indicated for the level of one of the types, it is identified with the next lower type, because each type is described in terms of the minimum characteristics of the range of difficulty it represents. Thus, while you are engaged in some Type III work, we evaluate most of your characteristic assignments as Type II and not fully meeting the minimum criteria for Type III. Accordingly, Type II is proper for this factor.
>
> 2. *Level of Responsibility*
>
> Your attorney has argued for Level E for this factor in your position. We do not view Level E as being proper for your position. For example, at Level E attorneys often deal with matters of such scope and complexity that they require the concentrated efforts of several attorneys or other specialists. In such circumstances attorneys at this level are normally responsible for directing, coordinating, and reviewing the work of the team. The cases handled by the principal attorney before administrative tribunals in many instances warrant the assistance of one or more attorneys of lower grade or other specialists.
>
> Other than your supervisor, GS-14, you and your co-appellant, also GS-13, are the only nonsupervisory attorneys in your organizational unit. Under the circumstances we affirm our original evaluation of this factor at Level D.

A combination of Type III [sic] cases and Level D responsibility equates to grade level GS-13.

These letters also stated that, in accordance with usual procedures, the files concerning the regional director's decision were being referred to the Classification Appeals Office, Bureau of Personnel Management Evaluation, U.S. Civil Service Commission, Washington, D.C.

17. Plaintiffs requested an interview with the Classification Appeals Office through a letter dated November 25, 1970; a subsequent letter dated December 16, 1970, confirmed a set date and time for the interview, which took place on January 11, 1971. By letter dated January 15, 1971, plaintiffs formally requested the Classification Appeals Office to reopen and reconsider their appeals. On February 23, 1971, the Classification Appeals Office informed plaintiffs that they were properly classified at Trial Attorney GS-905-13. The letter signed by M. L. Etzell, elaborated on the decision as follows:

> We have made a thorough study of all aspects of the appeals. Our review included the data contained in the original submission to our regional office and the information and exhibits submitted to this Office. Our review does not disclose any basis for a finding of probable error in our Philadelphia Region's decision. Accordingly, the decision of the Philadelphia Region that the positions occupied by Messrs. Testan and Zarill[i] are properly classified as Trial Attorney GS-905-13 remains the final decision of the Commission.
>
> In our independent evaluation careful consideration was given to the level-distinguishing elements of the casework and legal problems stressed by you [plaintiffs' attorney] and your clients. As indicated in the standards, these include complexity of legal and factual issues, impact of the case, amount of money involved, importance of the cases in setting precedents, nature of the competition and delicateness of the problem. The standards instruct that these elements are not independent of one another and their relationship must be considered in evaluating the nature of

the case or legal problem. It is stated, "For example, the economic, political, or social impact of a case cannot be considered apart from its importance as a legal or administrative precedent."

In describing Type III cases or legal problems the standards highlight three characteristics: (1) involvement with extremely complex and difficult legal questions or factual issues requiring a high order of original and creative legal endeavor; or involvement with complex factual or policy issues requiring extensive research, analysis and obtaining and evaluating expert testimony or information in controversial areas of scientific, financial, corporate, medical, engineering, or other highly technical issues; (2) involvement with cases or problems that can have the effect of substantially broadening or restricting the activities of an agency, that have an important impact on a major industry whose economic position affects the health and stability of the general economy, that have an important impact on major private or public interests, or that have included problems of unusual delicacy; (3) involvement with cases of very large sums of money that are vigorously contested and are of nationwide interest.

In your further appeal to this Office you claim that the types of cases handled by the appellants meet criteria (1) because they have complex factual issues requiring extensive research, analysis, and obtaining and evaluating expert testimony in "controversial areas of science, financial, corporate, medical, engineering or other highly technical areas."

Our analysis of the exhibits revealed that the majority of cases do not meet criteria (1) in terms of extensiveness of research required to establish facts and to evaluate controversial professional or technical matters. Type III cases described in the standards represent the most difficult cases handled by attorneys in the government, as indicated in the introduction to the standards. An example of a Type III case involving controversial scientific or medical areas is one relating to the food and drug laws where dispute

arises over definitions and standards of identity, tolerances for poisonous or deleterious substances, pesticides, additives; an example of a controversial corporate or financial case is one with respect to the administration of foreign-owned assets involving billions of dollars, intercorporate relationships, financial operations of a large industrial enterprise, and numerous interested persons.

With regard to the other two characteristics, we find no evidence that the cases of the appellants have major economic, social, political or agency impact, or involve very large sums of money.

Illustrations furnished in the standards for Type II are comparable to and more indicative of the appellants' legal effort. We consider the degree of difficulty of the legal problems and issues, their effect, and the sums of money involved, characteristic of this level.

For the second factor in the standards, Level of Responsibility, we agree with our regional office that the functions of the appellants fall between Levels C and E. You [plaintiffs' attorney] have argued for your clients that since they serve as the principal attorney in charge of a case, this satisfies the requirement for assignment of Level E to the position. The fact that your clients handle their assignments independently does not make them a "Principal Attorney" within the meaning of our standards. The Level E function in the standards is described as follows: "Acts as principal attorney *in charge* of the preparation and presentation of cases before administrative tribunals or before the trial or appellate courts, where the cases (a) are of such *scope* that they may, in many instances, warrant the *assistance* of *one* or *more attorneys* of lower grade or other specialists *and* (b) are of *such importance* that they frequently involve matching professional skills against some of the *most* distinguished and highly paid legal talent in the country." (Underlining supplied.) We find no evidence of such a function being performed.

In conclusion, our finding of Type II work and Level D responsibility converts to grade GS-13 for the appellants' position by reference to the Grade-level Conversion Chart in the standards.

18. On April 20, 1971, plaintiffs appealed the decision of the Classification Appeals Office to the Commissioners of the Civil Service Commission, calling their attention to an AFLC announcement assigning a GS-14 level to a position entitled "Trial Attorney (Contract)." In addition, plaintiffs referred to a directive of DSA Headquarters, Cameron Station, Alexandria, Virginia, entitled "Management Control of High Grade Positions and Average Grade Structure," which limited increases in GS-14 positions to a corresponding number of decreases in GS-15 positions. It was plaintiffs' position at that time that the directive had the effect of subverting the classification system and was itself an arbitrary action.

By letter dated July 14, 1971, Robert B. Bates, Assistant to the Commissioners (Appeals), notified plaintiffs that their request to reopen the case had been denied. The letter read, in pertinent part:

> We have carefully considered the written argument in support of the request to reopen this case, along with the documents enclosed with your letters. We find, however, that the representations made do not indicate probable error in the decision of the Classification Appeals Office. With regard to Announcement No. L-3 (1970) for Trial Attorney (Contract) positions for AFLC positions at Wright-Patterson Air Force Base, Ohio, we find that the positions covered by this announcement are not the same as the positions occupied by Messrs. Testan and Zarilli. In any event, the Commission does not classify a position by comparison of the duties of the position with the duties of positions in other agencies, but determines the proper classification of a position by comparison of the duties with the applicable classification standards.
>
> With regard to the memorandum dated December 11, 1968 on the subject "Management Control of High

Grade Positions and Average Grade Structure" issued by W. W. Vaughn, Major General, USA, Deputy Director, Defense Supply Agency, Headquarters, Cameron Station, Alexandria, Virginia, we find that this memorandum, and the other related documents submitted with your April 20, 1971 letter, have no bearing on the issue regarding the classification of the positions of the appellants. These documents pertain to administrative controls over the number of higher-grade positions, and would not serve as a bar to the promotion of an employee whose position warranted a higher classification.

With regard to your arguments that other agencies have Trial Counsel before the Armed Services Board of Contract Appeals who are classified at GS-14 under General Attorney Series, GS-905, we can only repeat that positions in one agency are not classified by comparing them with positions in other agencies, but are classified by a comparison of the duties of the individual positions with the applicable classification standards. In the case of the appellants, it has been determined that the duties of their positions compare closely with the classification standards at the GS-13 level.

In view of the above we find that the representations made in support of the request to reopen this case do not indicate an erroneous interpretation of law or regulation or a misapplication of established policy by the Classification Appeals Office in its February 23, 1971 decision in the case, and do not otherwise meet the criteria for reopening a previous decision of the Classification Appeals Office. The request to reopen this case, therefore, must be and is, denied.

19. The structure and functions of the Contract Appeals Directorate, Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, were described by William F. Hebert, Director, as follows:

> 2. The mission of the Directorate of Contract Appeals is to:

a. Review the legal sufficiency of, and advise on all proposed findings and decisions of all Air Force Contracting Officers under the Disputes procedures of all Air Force contracts.

b. Represent the Secretary of the Air Force in the defense of all appeals under Air Force contracts before the Armed Services Board of Contract Appeals.

c. Prepare litigation reports for, and otherwise assist, Headquarters USAF, and the Department of Justice in litigation before Federal courts involving Air Force contracts.

d. Assist Air Force Contracting Officers in implementing ASBCA decisions and in negotiating settlements of disputes. The Office of the Staff Judge Advocate, Air Force Logistics Command, has been delegated by the Secretary of the Air Force the authority to perform the above functions Air Force wide. As part of that Office, the Directorate of Contract Appeals performs this mission for the entire Department of the Air Force. The Director of the Directorate of Contract Appeals has been designated as the Chief Trial Attorney of the Air Force.

> 3. The Directorate of Contract Appeals consists of a Director position occupied by an Air Force Colonel, a Deputy Director position manned by a Lt. Colonel and twelve Trial Attorney positions. * * * [T]he Directorate is divided into two Trial Divisions, each under the supervision of a Division Chief who also carries a full case load. The GS-14 Trial Attorneys are under the administrative supervision of the Division Chief, but receive no direct professional supervision from a level below the Director/Deputy Director. The GS-13 level Trial Attorneys receive both administrative and professional supervision from the Division Chief. The GS-15 Senior Trial Attorneys operate independently of the Division organization and are responsible directly to the Director/Deputy Director. They are responsible for handling the most difficult and involved cases the Directorate

receives. When appropriate, they provide direct advice to officials at the DoD, Air Force Secretarial and Air Staff levels, the Department of Justice and major command levels concerning complex, high-dollar and controversial cases involving the Air Force. * * *

4. A review of my available records indicates that, as of 31 December 1971, my office had 227 appeals currently pending before the Armed Services Board of Contract Appeals with a total dollar value of $174,107,494.00. All but 3% of the dollar volume originated with two commands, the Air Force Logistics Command (AFLC) and the Air Force Systems Command (AFSC). The Air Force Logistics Command is a major Air Force command whose function is to provide logistics support; that is, material and services for USAF organizations, other military services, other Government agencies, contractors, and military assistance programs. The Air Force Systems Command is also a major Air Force command. Their mission is to serve as the single manager of all phases of acquisition of complete weapons and aerospace systems.

5. The Supply and Research and Development contracts utilized by AFLC and AFSC encompass Firm Fixed-Price, Fixed-Price with escalation, Fixed-Price with various incentive features, Fixed-Price with prospective and retroactive redetermination; all cost-type contracting including: Cost-Plus-Fixed-Fee, Cost-Plus-Incentive-Fee, Cost-Plus-Award-Fee; and occasionally other types of special purpose contracts. These contracts are procured by various methods, such as Formal Advertising including two-step formal advertising, Negotiation including Sole-Source, and involve procurement policies such as Total Weapon Systems Package Procurement, Multi-Year Procurement and Prototyping.

6. In addition to the often encountered issues of construction changes, defective specifications, latent defects, warranties, and terminations, these contracts

generate appeals under the Disputes clause involving issues of: (1) Cost Principles including allocation of and allowability of independent research and development costs, excess facilities and idle capacity, employee fringe benefits, pre-contract costs, rental and leasing costs, severance pay, and special tooling and special equipment costs; (2) Patent royalty payments; (3) Bonds, insurance and indemnification; (4) Taxes; (5) Labor law including the Fair Labor Standards Act and the Service Contract Act; (6) Foreign purchases that involve the examination of and interpretation of international agreements; (7) Transportation including warehousing and drayage; (8) Value engineering change proposals; (9) Defective pricing; and (10) Impossibility of performance.

7. Appeals arising out of ALFC and AFSC contracts contain some of the most complex factual issues tried before the Armed Services Board of Contract Appeals. Trials lasting four to six weeks are not unusual, and trials of one week duration are common. The majority of these trials require the development and use of expert testimony in the fields of aerospace and civil engineering, auditing and other technical areas. These appeals are commonly presented by teams of attorneys, because of the complexity and amount of money involved. The contractors are routinely represented by the most prestigious and competent counsel nationally in the field of Government procurement law and also maintain large in-house staffs of attorneys. Firms such as Sellers, Conner and Cuneo, Washington, DC; Wachtel, Wiener and Ross, Washington, DC; McNutt, Dudley and Eastwood, Washington, DC; Reavis, Pogue, Neal and Rose, Washington, DC; Miller, Groezinger, Pettit and Evers, San Francisco; Rain, Harrell, Emory, Young and Doke, Dallas, Texas; Manleleone and McCrory, Los Angeles; vom Baur, Coburn, Simmons and Turtle, Washington, DC; and Holman, Marion Perkins, Coie and Stone, Seattle,

Washington, frequently appear as opposing counsel.

* * * *

10. I have examined the affidavit of Donnell K. Wolverton, furnished as Plaintiffs' Exhibit 2, the Position Descriptions of Messrs. Testan and Zarilli [sic] as contained in Defendant's Exhibit 2, and I have reviewed Plaintiffs' Exhibits 4 and 5, the examples of Plaintiffs' work products. I disagree with the conclusions of Mr. Wolverton in that I do not think that the duties and responsibilities of Messrs. Testan and Zarilli [sic] are identical to those performed by the Trial Attorneys in my office. I feel that the activities of our Trial Attorneys are extremely more broad and complex as to the type of contract involved in their appeals, the subject matter of the appeals, and the amount of money involved. The requisite degree of professional versatility and expertise required to meet the requirements of the appeal function at a Departmental level is far greater than that required to perform a more limited but similar function at a restricted field activity level.

11. On 25 January 1972, as a member of the Ad Hoc Civilian Attorney Committee, AFLC, I had occasion to participate in the interview of Plaintiff Testan for our GS-*15* Trial Attorney position covered by Announcement No. L-3 (1972). During the interview, it was gleaned that his experience had been limited to the trial of disputes arising from fixed-price supply type contracts. He indicated his trial workload was about twelve cases per year. He also indicated that his reviews of Contracting Officers' final decisions were also limited to fixed-price contracts and that most of his cases involved default actions. He was only incidently [sic] familiar with other types of contracting. His advisory duties over the years had been limited to the center where he was employed. [Emphasis added.]

20. The position description for senior trial attorney (GS-15) at the Staff Judge Advocate's Office, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, reads, in pertinent part, as follows:

I. INTRODUCTION:

* * * *

B. This position is that of a Senior Trial Attorney performing the functions set out above for the Department of the Air Force in connection with the most difficult and most important cases arising within the Air Force.

II. DUTIES AND RESPONSIBILITIES:

A. Reviews for legal sufficiency and furnishes legal advice on findings and decisions to be issued to contractors under Air Force contracts. When extensive experience, expertise and judgment are expeditiously required, is sent to Air Force activities to review and approve proposed findings and decisions of high dollar value, public interest and national defense significance. A position of trust requiring approval of the issuance of such findings and decisions without further professional review. (10%)

B. Prepares the most complex and important appeal cases for trial and hearing before the Armed Services Board of Contract Appeals. This includes examination and evaluation of evidence, preparation of pleadings, interview and evaluation of witnesses, including technical experts concerning sophisticated and complex areas of technology and development, taking of depositions, preparation of interrogatories, planning trial techniques. Supervises the professional efforts of Trial Attorneys assigned to assist him. (30%)

C. Based upon a personal evaluation of the evidence and contract provisions determines when contract appeals cases should be settled by negotiation prior to hearing; conducts such negotiation in conjunction with the Contracting Officer and prepares any necessary legal documents to effect such negotiated settlements. (10%)

D. Acts as principal attorney in charge of the preparation and presentation of assigned appeals be-

fore the Armed Services Board of Contract Appeals. Exercises full responsibility for the development and presentation of the cases assigned, including making opening statements, verbal stipulations, examination and cross-examination of witnesses, introduction of evidence, examination and comments on evidence proffered by the contractor, making and explaining legal basis for objections to testimony or other evidence, oral legal argument on issues and evidence, and closing statements. Supervises other Trial Attorneys and technical personnel assigned to assist him for the duration of the trial. Is frequently matched against the most highly paid legal talent with distinguished national reputations. (30%)

E. Determines and develops post-trial procedures and prepares the Government's written brief on each assigned case. This includes consultation with such professional, engineering and other technical experts as necessary, review of the complete verbatim transcript of the case, examination of all documentary evidence, research and examination of all applicable laws, regulations and policy directives and precedent where such precedent exists, and the writing of a legal brief setting out the Government's contentions and the evidence and law supporting them. (10%)

F. Renders oral advice to contracting officers, procurement officials and Government attorneys throughout the Air Force on significant rights and obligations arising under Air Force contracts. Consults with and is consulted by procurement policy, audit and fiscal officials at DOD, Air Force Secretarial level and Hq USAF on cases involving or impacting important procurement precedents. (10%)

III. CONTROLS OVER WORK:

Works under the administrative and policy supervision of the Director (Chief Trial Attorney), JAB, but is expected to exercise requisite independent professional judgment and discretion in the performance of his duties and responsibilities. Works independently or is assisted by technical experts or other attorneys under his guidance. Is guided by Federal and State laws and regulations, court decisions, decisions of administrative tribunals, decisions of the Comptroller General, and regulations and Directive of the Department of Defense and the Air Force in performance of duties.

Under the "Substantiating Analysis" for this position, the duties and responsibilities assigned were compared with the General Attorney Series, GS-905-0, in the following language:

III. GRADE LEVEL DETERMINATION:

1. Nature of Cases or Legal Problems

• • • •

c. Position compares favorably with Type III. Directly and indirectly the money amounts of cases listed are associated with contracts that range from several hundred thousand dollars to several million dollars. They are frequently contested strongly and vigorously in formal proceedings by corporations employing extremely capable legal talent. Cases involve complex issues, e.g., defaults, fraud, terminations, disputed claims for increased costs, disputed action to recoup excess costs or charges. The cases involve interpretation of contract clauses due to ambiguity of language and involve FPI, FPR, CPFF, time and material contracts for services and equipment. Cases are related to all areas since the Staff Judge Advocate renders legal service to all Commands. A work cycle of 1-2 years is determined a reasonable time period within which the employee of this position can be expected to perform all aspects of this position from the least to most difficult. Incumbent is required to travel nationwide throughout all the Commands to prepare cases. Since he carries 20-25 cases concurrently, the problems of scheduling and completing cases compounds the difficulty and complexity of work.

2. Level of Responsibility

* * * *

b. Level E

(1) Nature of functions—Reviews cases for agencies responsible for the conduct of litigation in Federal courts to determine whether to recommend prosecution. Reviews, for agencies responsible for appellate litigation, records of suits for or against the government in which the decision was unfavorable to the government to determine whether to recommend appeal to a higher court.

(2) Supervision and guidance received—Attorneys are expected to carry out any assignment without preliminary instruction. Supervisor may discuss the significance of the problem. Incumbent independently conducts the investigation or negotiation, plans the approach, and develops the completed product; or represents the government at the conference, hearing, or trial. Completed work in the advisory or legislative and regulatory areas is reviewed before it is signed out.

(3) Personal work contacts—Confers or negotiates with top administrative personnel in the agency and private business on important legal and policy questions. Tries cases before courts or administrative bodies.

(4) Nature and scope of recommendations and decisions—Advice on the interpretation of law or on proposed changes in legislation, policy, and regulations is often given directly to heads of programs. In some instances recommendations are made through supervisors but these recommendations are usually tantamount to final decision. Attorneys at this level often deal with matters of such scope and complexity that they require the concentrated efforts of several attorneys or other specialists. In such circumstances attorneys at this level are normally responsible for directing, coordinating, and reviewing the work of the team.

c. Subject position meets level E in all aspects as cited above.

IV. SUMMARY:

Type III, Level E equates to GS-15 on the Grade-Level Conversion Chart. * * *

21. The position description for trial attorney (contract), level GS-905-*13*, at the Staff Judge Advocate's Office, Air Force Logistics Command, Wright-Patterson Air Force Base, reads, in pertinent part, as follows:

II. DUTIES AND RESPONSIBILITIES:

A. Reviews for legal sufficiency and furnishes legal advice on findings and decisions to be issued to contractors under Air Force contracts. 10%

B. Prepares appeal cases for trial and hearing before the Armed Services Board of Contract Appeals. This includes the following: (1) Examination, review and study of all correspondence, contractual documents, and other pertinent documentary evidence as well as a review of all applicable laws, regulations and directives; (2) preparation of legal opinions, all necessary written pleadings, including answers, motions, briefs, and such other legal papers as required in each case; (3) Interviewing and corresponding with witnesses, including professional and technical experts; (4) arranging preparation of interrogatories and cross interrogatories to be propounded to such witnesses; (5) arranging for hearing dates with opposing counsel and for the presence of all Government witnesses at such hearings; (6) Plans and develops trial techniques, tactics, legal theories and procedures to be used in the trial of each assigned case. 30%

C. Based upon a personal evaluation of the evidence and contract provisions, recommends to the Division Chief, in appropriate cases, that a determination should be made to settle appeals by negotiation prior to a hearing; conducts such negotia-

tion in conjunction with the contracting officer and prepares any necessary legal documents to effect such negotiated settlements, for approval by the Division Chief. 15%

D. Represents the Government during the trial of assigned appeals. This includes making opening statements, verbal stipulation, examination and cross-examination of witnesses, introduction of evidence, examination and comments on evidence proffered by the contractor, making and explaining legal basis for objections to testimony or other evidence, oral legal argument on issues and evidence, and closing statements. 30%

E. Determines and develops post-trial procedures and prepares the Government's written brief on each assigned case. This includes consultation with such professional, engineering and other technical experts as necessary, review of the complete verbatim transcript of the case, examination of all documentary evidence, research and examination of all applicable laws, regulations and policy directives and precedent where such precedent exists, and the writing of a legal brief setting out the Government's contentions and the evidence and law supporting them. 15%

III. CONTROLS OVER WORK:

Works under general administrative and professional supervision of the District Chief. Works independently or as assisted by technical experts. Is guided by Federal and State laws and regulations, court decisions, decisions of administrative tribunals, decisions of the Comptroller General, and regulations and Directives of the Department of Defense and the Air Force in performance of duties.

No "Substantiating Analysis" was submitted by the parties for this particular position.

22. Richard C. Solibakke, Chairman, Armed Services Board of Contract Appeals, responded to an inquiry made by plaintiffs' attorney as follows:

My knowledge on this subject [grades of civilian trial attorneys appearing before the ASBCA] is from informal sources and I do not know the grades of all of the civilian trial attorneys appearing before us. I am familiar, however, with the grades of a number of such attorneys. There is some variance, *but the predominant present grade appears to be a GS-14.* More specifically, all of the civilians in the office of the Air Force Chief Trial Attorney are GS-14's. The single civilian in the office of the Army Chief Trial Attorney is a GS-14. The full time Division trial attorneys in the Corps of Engineers [of the Army] are GS-14's, with one exception, who is a GS-13. The Corps of Engineers District Counsel [field offices of the Corps] who sometimes appear as trial attorneys before us are approximately two-thirds GS-14's and one-third GS-13's. Within the Navy offices which appear before us there is considerable variation, ranging from an occasional GS-15 presenting a case, down through an occasional GS-12. The average in the Navy is GS-13 or 14. I have very little personal knowledge on the grade structure for DSA trial attorneys * * *. [Emphasis and interpolated matter added.]

23. Oscar A. Moldawer, Chief Trial Attorney, DPSC, stated as follows:

* * * Since their initial assignment, Messrs. Testan and Zarrilli have handled numerous cases of considerable complexity, involving claims which have aggregated several millions of dollars and have been pitted against some of the most outstanding attorneys in the country specializing in Government contract law.

* * * The duties and responsibilities of my Trial Attorneys are identical to those performed by Trial Attorneys of the Contract Appeals Division of the Office of the Staff Judge Advocate, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, who have been classified by the U. S. Civil Service Commission under the Gen-

eral Attorney Series (GS-905-0) as grade GS-14. Both Trial Attorney positions call for identical practice before the same Armed Services Board of Contract Appeals.

24. Donnell K. Wolverton, Counsel, DPSC, described their work as follows:

> * * * The duties and responsibilities of my Trial Attorneys are identical to those performed by Trial Attorneys of the Contract Appeals Division of the Office of the Staff Judge Advocate, Headquarters Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, who have been classified by the U. S. Civil Service Commission under the General Attorney Series (GS-905-0) as grade GS-14. * * *
>
> * * * The trial section of my Office is staffed by Herman R. Testan and Francis L. Zarrilli, Esquires, as Trial Attorneys at grade GS-13 and Oscar A. Moldawer, Esquire, as Chief Trial Attorney at grade GS-14. The Chief Trial Attorney serves as coordinating member of the section and his responsibility, in addition to trial of cases before the Armed Services Board of Contract Appeals, is limited to assure that DPSC policy is followed, progress is made on all assigned cases and that a current status report is maintained. The assignment of cases is accomplished on a random basis depending solely on the workload of the 3 members of the trial section at the time of assignment. Once a case is assigned, the particular attorney assumes complete and sole responsibility therefor, using independent judgment in development of the theory of the case, selection of witnesses, use of trial tactics and strategy, preparation of all pleadings, motions, briefs, correspondence, etc., until a final decision is rendered by the Armed Services Board of Contract Appeals; or, if warranted by applicable facts and law in the sole judgment of the assigned attorney, the case may be settled before, during or after trial. * * *

Mr. Wolverton also concluded that the positions occupied by plaintiffs met the standards of type III, level D, of the classification series and, therefore, merited GS-14 grades.

25. Plaintiffs have submitted voluminous documentary evidence as examples of their work products. These submissions were reviewed by Lenora R. Fine, Supervisory Position Classification Specialist, OCP, DSPC, DSA, who classified each individual submission, with one exception, as a type II case. The one case not classified was a bill of complaint written by Mr. Testan which she considered "inadequate for analysis of potential difficulty."

Jesse Amass, Deputy Chief, Classification Appeals Office, U. S. Civil Service Commission, also received these submissions for evaluation purposes. The materials were referred to Patricia Fagge, Personnel Classification Specialist, Classification Appeals Office, who reported that the majority of the cases reflected various factors characteristic of type II rather than type III. As a result of her report, Mr. Amass concluded that the exhibits "do not tend to establish that any error has been made in the interpretation and application of the standards to the facts. The plaintiffs would appear to be properly classified as Trial Attorneys GS-905-13 based on our review of those materials."

Ms. Fagge's analysis of the materials reads as follows:

> We have thoroughly reviewed the examples of cases submitted by Messrs. Herman R. Testan and Francis L. Zarrilli in support of their contention that the nature of their cases or legal problems meet the criteria for Type III and that their level of responsibility meets the criteria for Level E as described in the Civil Service Commission's published standards for the General Attorney Series GS-905. Most of the exhibits post-date the period of appeal consideration previously by the Commission and, therefore, constitute new evidence not heretofore considered.
>
> The standards describe under Factor I the minimum characteristics of the most difficult cases

handled by attorneys in the Federal government. According to the standards those cases involve (1) *extremely* complex and difficult legal questions or factual issues which require a *high* order of *creative* and *original* legal endeavor in order to obtain a reasonable balance of conflicting interests; or complex factual or policy issues requiring *extensive* research, *analysis* and evaluation of expert testimony or information in *controversial areas* of scientific, financial, corporate, medical, engineering, or other highly technical areas; (2) impact on agency activities or major industries whose economic position affects the health and stability of the general economy, or important impact on major private or public interests; or problems of unusual delicacy, such as fraud cases, because of the serious consequence of error and the great burden of proof assumed by the Government; (3) very large sums of money (e.g., about a million dollars) and/or they are frequently *virorously* [sic] contested by *extremely* capable legal talent (e.g., a major anti-trust case); and there is nationwide interest in the cases.

In order to meet the criteria for Type III a majority of the cases must be of the complexity, scope and impact described under one of the three characteristics.

In our opinion, the cases do not meet the minimum characteristics for Type III. Rather, we find that the majority of the cases are characterized variously by the presence of difficult legal or factual questions, novelty of issues, large sums of money (about one hundred thousand dollars), or the case or legal problem affects economically, socially, or politically, either directly or as a legal or administrative precedent, a significant segment of private or public interests, such as a class of Government contractors. [sic] These are Type II characteristics.

With respect to Factor 2, Level of Responsibility, we do not find that the plaintiffs have submitted evidence that they exceed the Level D evaluation assigned by all levels of review in the Government.

Factor 2 also describes three levels of intensity—A, C, and E. The intervening levels of B and D are used when a position's responsibilities fall in between.

The plaintiffs exceed Level C because of the independence with which they work. They do not meet Level E in any aspect. Trial work is cited in the standards of both Level C and Level E, so that fact alone does not qualify the position for Level E. However, because their supervisor, the Chief Trial Attorney, GS-14, does not give the plaintiffs preliminary instructions with assignments nor detailed review of the work accomplished, as described at Level C, and because they fully prepare and present their cases, Level D is the proper evaluation for this factor.

In conclusion, we do not find that material evidence has been submitted that has not already been considered and that an error has been made in the interpretation and application of standards to the facts.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to reclassification to grade GS-905-14.

SUPREME COURT OF THE UNITED STATES

No. A-265

UNITED STATES, PETITIONER

v.

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 16, 1974.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 17 day of October, 1974.

SUPREME COURT OF THE UNITED STATES

No. A-265

UNITED STATES, PETITIONER

v.

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including December 16, 1974.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 19th day of November, 1974.

SUPREME COURT OF THE UNITED STATES

No. 74-753

UNITED STATES, PETITIONER

v.

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

ORDER ALLOWING CERTIORARI
Filed February 18, 1975

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 573670 147

Supreme Court, U. S.
FILED
JAN 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-753

UNITED STATES, *Petitioner*

v.

HERMAN R. TESTAN and
FRANCIS L. ZARRILLI, *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-753

UNITED STATES, *Petitioner*

v.

HERMAN R. TESTAN and
FRANCIS L. ZARRILLI, *Respondents*

BRIEF FOR RESPONDENTS IN OPPOSITION

On Petition for a Writ of Certiorari to
the United States Court of Claims

QUESTION PRESENTED

Has not the Court of Claims the right to enter judgment on the issue of liability and leave, for further determination, the amount of damages, if any, due?

ARGUMENT

Certiorari Should Be Denied

The Court of Claims has always entered judgment on the issue of liability, leaving for further determination the issue of damages, if any.

Petitioner contends that the Court of Claims erred in the order entered in this case and further that respondents have not a claim for money damages. This is incorrect since the respondents' claim is for back pay under 5 U.S.C. §5596(b) and the Court of Claims has ruled upon established precedents that respondents have a right to recover back pay.

What is at issue is respondents' entitlement to classification at grade GS-14 instead of their present grade GS-13. The Court of Claims ruled that the action of the Civil Service Commission was arbitrary and capricious in failing to reclassify respondents' positions at GS-14.

Respondents are trial attorneys in disputes article proceedings before the Armed Services Board of Contract Appeals, representing the Defense Personnel Support Center, which procures clothing and equipment, subsistence supplies, and medical supplies. The position descriptions of respondents' positions are identical with the position descriptions of trial attorneys, GS-14, who appear before the Armed Services Board of Contract Appeals on behalf of the Air Force Logistics Command. The Classification Act, 5 U.S.C. §§5101 and 5301, establishes the principle of equal pay for substantially equal work.

The order entered by the Court of Claims finding respondents entitled to back pay and remanding to the Civil Service Commission for further proceedings is not anything new. In *Allison v. United States*, 451 F.2d 1035, 196 Ct.Cl. 263 (1971), and in *Pettit v. United States*, 488 F.2d 1026, 203 Ct.Cl. 207 (1973), the Court of Claims was similarly concerned with actions for back pay, and in *Allison, supra*, suspended proceedings to allow plaintiffs there to

apply for administrative findings, and in *Pettit, supra*, remanded to the Civil Service Commission pursuant to Pub. L. 92-415, 28 U.S.C. §1491 for further proceedings. The Court of Claims has always entered judgments on the right of a party to recover, reserving the determination of the amount of recovery, if any, for further proceedings: See Court of Claims present Rule 131(c); Rule 47(c) of the 1964 Rules: 165 Ct.Cl. 56 (1964); Rule 38(c) of the 1957 Rules: 140 Ct.Cl. 48 (1957); Rule 38(c) of the 1953 Rules: 126 Ct.Cl. 46 (1953); and Rule 38(c) of the 1951 Rules: 118 Ct.Cl. 40 (1951).

Such action by the Court of Claims has been recognized by this Court: *United States v. Caltex, Inc.*, 344 U.S. 149 (1952); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 162 (1958). In *Greene v. United States*, 376 U.S. 149, 153 (1964), an order had been entered by the Court of Claims suspending proceedings pending pursuit of further administrative remedies relative to a back pay claim.

More recently, under the Wunderlich Act, 41 U.S.C. §§321 and 322, the Court of Claims has entered judgments on the issue of liability and stayed proceedings to permit the parties to obtain an administrative resolution from the Armed Services Board of Contract Appeals of the equitable adjustment to which plaintiff is entitled under the Changes clause: *Southwest Welding & Mfg. Co. v. United States*, 413 F.2d 1167, 188 Ct.Cl. 925 (1969); *Clement Bros. Co. v. United States*, 418 F.2d 1356, 190 Ct.Cl. 51 (1969). There is nothing new in what the Court of Claims has done in this case. It has done what it has always done and which has been approved by this Court.

The Court of Claims here ruled that it had the right to judicially review the claim of a person denied equal pay for equal work in a job classification by virtue of such statutory provisions, and that the Tucker Act jurisdiction of the Court under 28 U.S.C. §1491 is adequate for this purpose. It had so ruled in *Allison v. United States, supra*.

It is clear, therefore, that there is no proper basis for the grant of certiorari in this case and it is respectfully submitted that the Petition for a Writ of Certiorari to the Court of Claims should be denied.

Respectfully submitted,

EDWIN J. McDERMOTT
Attorney for Respondents

No. 74-753

Supreme Court, U. S.
FILED
MAY 2 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-753

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN R. TESTAN and FRANCIS L. ZARRILLI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 499 F. 2d 690.

JURISDICTION

The judgment of the Court of Claims (Pet. App. A, p. 3a) was entered on July 19, 1974. Respondents' motion to amend the judgment was granted on

November 1, 1974 (Pet. App. B).[1] On October 17, 1974, and November 19, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari respectively to November 16, 1974, and December 16, 1974 (App. 118, 119). The petition was filed on December 16, 1974, and was granted on February 18, 1975 (*id.* at 120).

The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims should have dismissed this suit for reclassification of federal civil service positions and back pay for lack of jurisdiction under the Tucker Act.

2. Whether, in determining the correctness of respondents' classifications, the Classification Act requires that the positions held by respondents be compared with those of employees in another agency.

STATUTES INVOLVED

The Tucker Act, as amended, 28 U.S.C. 1491, provides in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation

[1] The order entered by the Court of Claims on November 1, 1974, required the Civil Service Commission to comply with the court's directions within 6 months of its judgment, as amended (Pet. App. B).

> of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Classification Act, as amended, 5 U.S.C. 5101, *et seq.*, provides in relevant part:

> § 5101. *Purpose.*
>
> It is the purpose of this chapter to provide a plan for classification of positions whereby—
>
> (1) in determining the rate of basic pay which an employee will receive—
>
> (A) the principle of equal pay for substantially equal work will be followed;
>
> * * * * *
>
> § 5107. *Classification of positions.*
>
> Except as otherwise provided by this chapter, each agency shall place each position under its jurisdiction in its appropriate class and grade in conformance with standards published by the Civil Service Commission or, if no published standards apply directly, consistently with published standards. When facts warrant, an agency may change a position which it has placed in a class or grade under this section from that class or grade to another class or grade. * * * [T]hese actions of an agency are the basis for pay and personnel transactions until changed by certificate of the Commission.
>
> § 5110. *Review of classification of positions.*
>
> (a) The Civil Service Commission, from time to time, shall review such number of positions in each agency as will enable the Commission to de-

termine whether the agency is placing positions in classes and grades in conformance with or consistently with published standards.

(b) When the Commission finds under subsection (a) of this section that a position is not placed in its proper class and grade in conformance with the published standards * * *, it shall, after consultation with appropriate officials of the agency concerned, place the position in its appropriate class and grade and shall certify this action to the agency. The agency shall act in accordance with the certificate, and the certificate is binding on all administrative, certifying, payroll, disbursing, and accounting officials.

§ 5112. *General authority of the Civil Service Commission.*

(a) Notwithstanding section 5107 of this title, the Civil Service Commission may—

(1) ascertain currently the facts as to the duties, responsibilities, and qualification requirements of a position;

(2) place in an appropriate class and grade a newly created position or a position coming initially under this chapter;

(3) decide whether a position is in its appropriate class and grade; and

(4) change a position from one class or grade to another class or grade when the facts warrant.

The Commission shall certify to the agency concerned its action under paragraph (2) or (4) of this subsection. The agency shall act in accordance with the certificate, and the certificate is

binding on all administrative, certifying, payroll, disbursing, and accounting officials.

(b) An employee affected or any agency may request at any time that the Commission exercise the authority granted to it by subsection (a) of this section and the Commission shall act on the request.

The Back Pay Act of 1966, as amended, 5 U.S.C. 5596, provides in relevant part:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; * * *.

STATEMENT

This is a suit by two federal civil service employees, purportedly under the Tucker Act, 28 U.S.C. 1491, seeking the reclassification of their positions to a higher grade and back pay. Respondents are em-

ployed by the Defense Personnel Support Center of the Defense Supply Agency as trial attorneys with the civil service grade of GS-13 (App. 43). On December 9, 1969, they requested their employing agency to reclassify their positions to grade GS-14 on the ground that according to standards promulgated by the Civil Service Commission their positions should be classified at that level (App. 44). In addition, respondents contended that their duties were identical to those of attorneys in positions classified as GS-14 in the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command ("A.F.L.C.") in Dayton, Ohio, and that under the "equal pay for substantially equal work" provision of the Classification Act, 5 U.S.C. 5101(1)(A), they were entitled to the higher classification (*ibid.*).

The Defense Supply Agency, after an audit by a position classification specialist, concluded that respondents' positions were correctly classified at GS-13 under the Civil Service Commission's classification standards (*id.* at 45, 91-92). On respondent's appeal, the Civil Service Commission reached the same conclusion and denied reclassification (*id.* at 44-45, 101-102). The Commission also ruled that a comparison of the positions held by respondents with those of attorneys employed by the A.F.L.C. was not a proper method of classification (*id.* at 45, 101).[2]

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[2] The Regional Director, United States Civil Service Commission, Philadelphia Region, stated in denying respondents' appeals that (App. 94):

> [a]ll positions subject to the Classification law contained in Title 5, U.S. Code, must be classified in conformance with published position classification standards of the Civil Service Commission, where these exist. For this reason your position may not be classified on the basis of comparison with the particular Attorney positions in other Government installations, which were cited in your appeal.

This ruling was confirmed in the order of the Commissioners of the Civil Service Commission denying respondents' request to reopen their case (App. 101):

> In any event, the Commission does not classify a position by comparison of the duties of the position with the duties of positions in other agencies, but determines the proper classification of a position by comparison of the duties with the applicable classification standards.

Respondents then instituted this suit in the Court of Claims, seeking (1) an order directing reclassification of their positions as of the date of the first administrative denial of their request and (2) back pay accrued from that date (App. 10-11). The Court of Claims, in a 4-3 decision, held that the Tucker Act empowered it to adjudicate claims founded upon the Classification Act (Pet. App. A). On the merits, the court concluded that the Civil Service Commission's failure to compare respondents' positions with those of the A.F.L.C. attorneys was arbitrary and capricious (*id.* at 2a). Although the court stated that it is "[o]rdinarily" not arbitrary and capricious for the Commission to refuse to make specific position-to-position comparisons, it held that such comparisons were required in this case since the "employees all belong to a small readily manageable cadre, their jobs have a large nexus of duties shared in common, and the other employees [were]

specifically pointed out by the complaining employees" (*ibid.*). The court therefore remanded the case to the Commission pursuant to the Remand Statute, Pub. L. 92-415, 86 Stat. 652, to make the comparison and to report the results to the court (*id.* at 3a).[3]

SUMMARY OF ARGUMENT

I. The threshold question presented by this case is whether the Classification Act or the Back Pay Act provides a monetary remedy for the period of a wrongful civil service classification. If either act provides for such a remedy, the Court of Claims' jurisdiction to entertain the present suit under the Tucker Act would be undoubted. If, on the other hand, neither act creates a substantive right to recover back pay for the period of a wrongful classification, the Court of Claims erred in not dismissing the suit for lack of jurisdiction. These results simply reflect the settled principle that the Court of Claims' jurisdiction under the Tucker Act extends only to con-

[3] The trial judge assigned to try the case by the Court of Claims had concluded that respondents were not entitled to the receipt of back pay because of their allegedly wrongful classifications (App. 57). He nevertheless recommended, however, that the case be remanded to the Civil Service Commission with directions to reclassify respondents as GS-14s (*id.* at 117). The majority of the Court of Claims rejected these recommendations, noting that "we are constrained to differ with the trial judge both as to our supposed lack of power to award back pay and our supposed possession of power to direct the reclassification of the [respondents] to Grade GS-14" (Pet. App. A, p. 3a).

troversies in which the claimant asserts a present right to a money judgment against the United States.

The Court of Claims' ruling sustaining its jurisdiction disclaimed reliance upon the Back Pay Act, and held by implication that the Classification Act creates a substantive right to back pay for wrongful classifications. We submit that that holding was in error. There is no provision in the Classification Act expressly waiving the sovereign immunity of the United States to suits seeking back pay for the period of a wrongful civil service classification and, under prevailing law, it is clear that such a waiver may not be found by implication. The history of the relationship between the federal government and its employees shows conclusively, moreover, that Congress did not intend to permit the award of back pay in such circumstances. Finally, although the Court of Claims did not rest its decision in this case on the Back Pay Act, it should be noted that that Act does not apply to wrongful classification claims.

II. The Court of Claims also misconstrued the substantive provisions of the Classification Act in a manner that will seriously impair the Act's effective administration. The *ad hoc* comparison required by the court between the positions held by respondents and positions in another federal agency has no warrant in the language or the legislative history of the Classification Act. Indeed, in enacting the Classification Act Congress specifically rejected *ad hoc* position-to-position comparison as a method of classification and required instead that civil service posi-

tions be classified by reference to a set of general classification standards promulgated by the Commission. Although the Court of Claims purported to limit its holding to the "peculiar" facts of the present case, we submit that the holding is not as susceptible to principled limitation as the court appeared to imply and that it will have the effect of distorting the classification system provided for by Congress in a substantial number of cases.

Congress' decision not to require employing agencies and the Civil Service Commission directly to compare the functions performed by particular employees with those performed elsewhere in the federal bureaucracy was largely dictated by practical considerations. Approximately 1.3 million persons are presently included in the federal civil service program, and the task of properly classifying the positions held by those persons is exceedingly complex. As a practical matter, the classification decisions reached by a person's employing agency will normally represent final rulings. In making those decisions, employing agencies generally do not have access to the kind of detailed information needed to make inter-agency comparisons of particular positions. While the Commission can obtain such information, Congress recognized in the Classification Act that the Commission could not involve itself in every classification case.

Even if Congress had intended Commission review of every classification decision reached by an employing agency, it would impose an unwarranted burden on the Commission to require *ad hoc* inter-agency comparisons—whether at the behest of particular em-

ployees or as a matter of general reviewing policy. Since the position or positions that are asserted to provide a standard for comparison in any given case may themselves be incorrectly classified under the Commission's general standards, the Commission would have to undertake a detailed investigation of those positions in order to provide itself with reliable data for reviewing the classification being appealed. There is no indication that Congress intended the Commission to shoulder the enormous administrative burdens of such investigations. This conclusion is confirmed by the Commission's long-standing administrative interpretation of its responsibilities under the Classification Act.

ARGUMENT

I. The Court Of Claims Lacked Jurisdiction To Entertain This Suit Since Neither The Classification Act Nor The Back Pay Act Provides A Monetary Remedy For The Period Of A Wrongful Classification

The central provision establishing the jurisdiction of the Court of Claims is that part of the Tucker Act codified in 28 U.S.C. 1491. That section provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or

> for liquidated or unliquidated damages in cases not sounding in tort.[4]

This Court has repeatedly held that this statutory formulation limits the jurisdiction of the Court of Claims to cases involving claims for "actual, presently due money damages from the United States." *United States* v. *King*, 395 U.S. 1, 3; accord, *e.g.*, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557; *United States* v. *Jones*, 131 U.S. 1, 18. It has long been established as well that, in view of the historical functions of and limitations upon the jurisdiction of the Court of Claims, that court lacks jurisdiction to issue declaratory judgments or to pass upon purely equitable matters. *E.g.*, *United States* v. *King*, *supra*, 395 U.S. at 3-5.[5]

It is of course similarly settled that the Tucker Act does not itself create any substantive right, enforceable against the United States, for "actual, presently due money damages." The Tucker Act merely confers jurisdiction in the Court of Claims whenever such a substantive right exists. See *Eastport*

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[4] The Judicial Code also gives the Court of Claims jurisdiction over matters arising from "any unsettled account" of federal officers or contractors, 28 U.S.C. 1494, and in a variety of other special situations not present here, 28 U.S.C. 1495-1499, 1504, 1505.

[5] See also *Lee* v. *Thornton*, No. 73-7006, decided February 18, 1975 (the Tucker Act provisions codified in 28 U.S.C. 1346(a), establishing limited federal district court jurisdiction "concurrent with the Court of Claims", authorize damage awards but not injunctive or declaratory relief); accord, *Richardson* v. *Morris*, 409 U.S. 464, 465-466.

S.S. Corp. v. *United States*, 372 F. 2d 1002, 1007-1009, 178 Ct. Cl. 599, 605-607.[6] Thus, the pivotal issue in the present case, so far as the Court of Claims' jurisdiction is concerned, is whether any federal statute confers upon respondents a substantive right to recover money damages from the United States for the period of their alleged wrongful civil service classifications.

The only possible sources of such a substantive right are the Classification Act and the Back Pay Act of 1966. The trial judge found in the present case that respondents were not entitled to back pay for the period of their alleged wrongful classifications under the Back Pay Act, 5 U.S.C. 5596;[7] and, as noted above, the Court of Claims held that there was no need for it to consider in the present case whether that Act created a claim for monetary relief in wrongful classification cases (Pet. App. A, p. 3a). Implicit in the Court of Claims' decision in this case, therefore, is the theory that a violation of the Classification Act

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[6] The Court of Claims noted in *Eastport S.S. Corp.* that in order to determine the limits of its jurisdiction under the Tucker Act "what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. If not, [the Court of Claims] cannot give relief under [that part of the Tucker Act codified in 28 U.S.C. 1491], although some separate general principle—arising, for example, from tort law—might lead to a remedy in another forum or under some special relief provision" (372 F. 2d at 1009, 178 Ct. Cl. at 607).

[7] App. 57.

gives rise to a claim for money damages against the United States in the amount of the back pay lost by respondents by virtue of their purported wrongful classifications.

In assessing the validity of this theory, it is well to begin by recognizing that established concepts of sovereign immunity make it clear that the United States may not be sued "save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586. As this Court stated in *United States* v. *King*, *supra*, 395 U.S. at 4, a waiver of sovereign immunity cannot be implied but must be directly and unequivocally expressed. Accord, *Soriano* v. *United States*, 352 U.S. 270, 276; *United States* v. *Shaw*, 309 U.S. 495, 500; *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533, 536. Thus, apart from the authority expressly conferred by statute, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States* v. *Sherwood*, *supra*, 312 U.S. at 587-588.

The Classification Act does not contain any provision or provisions expressly waiving the sovereign immunity of the United States to suits seeking back pay for the allegedly improper classification of federal civil service positions. In the "purpose" section of the Classification Act, 5 U.S.C. 5101, Congress provided that one of the principles guiding the classification of federal employees should be "equal pay

for substantially equal work." In subsequent sections of the Act, Congress both set out generally-applicable substantive standards to be observed in grading particular positions and provided for procedures ensuring that such standards would be effectively and equitably administered—in accordance with the congressional purposes expressed in Section 5101. We shall discuss the essentials of the classification scheme provided for by Congress in the Classification Act in a later section of this brief (see discussion, *infra*, at pp. 22-23). But no amount of analysis of that scheme, viewed as a whole or section-by-section, can avoid the conclusion that Congress made no provision in the Classification Act for the award of back pay to persons found, whether administratively or by judicial decision, to have been erroneously classified.

Although the Court of Claims did not address the issue, it should also be noted that the Back Pay Act of 1966 does not apply to wrongful classification claims.[8] The Back Pay Act authorizes the retroactive recovery of wages whenever a federal employee has been subjected to "an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part" of the compensation to

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[8] The 1967 legislation codifying the Back Pay Act in 5 U.S.C. 5596, Pub. L. 90-83, 81 Stat. 203-204, made no substantive changes in the Act. See H.R. Rep. No. 124, 90th Cong., 1st Sess., pp. 2, 10-11 (1967); S. Rep. No. 482, 90th Cong., 1st Sess., pp. 6, 14-15 (1967); 113 Cong. Rec. 8109 (1967) (colloquy between Congressman Gross and Congressman Kastenmeier); 113 Cong. Rec. 23905 (1967) (colloquy between Congressman Ford and Congressman Celler).

which he was otherwise entitled. 5 U.S.C. 5596. This language was not intended to cover wrongful classifications, however, but was aimed at providing a monetary remedy for wrongful reductions in grade, removals and suspensions, and "other unwarranted or unjustified actions affecting pay or allowances [which] could occur in the course of reassignments and change from full-time to part-time work." S. Rep. No. 1062, 89th Cong., 2d Sess. p. 3 (1966). The Civil Service Commission has consistently so construed the Back Pay Act (see 5 C.F.R. 550.803), as, indeed, has the Court of Claims (see, *e.g.*, *Desmond* v. *United States*, 201 Ct. Cl. 507, 526; *Ainsworth* v. *United States*, 399 F. 2d 176, 182-183, 185 Ct. Cl. 110, 120-121; *Dianish* v. *United States*, 183 Ct. Cl. 702, 707-709).

In reaching the merits of respondents' contentions, the Court of Claims did not in this case directly confront any of these impediments to its jurisdiction. The court did not, for example, point to any provision in the Classification Act authorizing the award of back pay in the event of a wrongful civil service classification and, as noted, it expressly disclaimed reliance upon the Back Pay Act as a predicate to its assumption of jurisdiction. Neither did the Court of Claims mention the doctrine of sovereign immunity or, more specifically, that consent to suit by the United States must be express and unequivocal and may not be found by implication.

In the latter connection, it should be noted that even if the doctrine of sovereign immunity did permit a consent to suit by the United States to be found by implication, the Court of Claims nevertheless would have been without jurisdiction in the present case. This conclusion follows from the history of the legal relationship between the federal government and its employees—a history which provides conclusive evidence of Congress' intention not to permit the recovery of back pay for the period of a wrongful civil service classification.

The prevailing rule for many years was that individual federal personnel actions were not subject to any judicial review. Thus, courts repeatedly refused to intervene where an employee claimed that he had been wrongfully discharged. See, *e.g.*, *Sampson* v. *Murray*, 415 U.S. 61, 69-70; *Keim* v. *United States*, 177 U.S. 290, 293-296. The courts similarly refused to grant any relief to employees who claimed that they had been denied promotions on improper grounds. See, *e.g.*, *Keim* v. *United States*, *supra*, 177 U.S. at 296; *United States* v. *McLean*, 95 U.S. 750, 753; *Tierney* v. *United States*, 168 Ct. Cl. 77, 80-81.

While Congress has now specifically provided in the Lloyd-LaFollette Act, 5 U.S.C. 7501, for administrative review of wrongful discharge claims, and in the Back Pay Act for the award of money damages for wrongful discharge, federal employing agencies continue to have broad discretion in determining most matters relating to the terms and conditions of federal employement.[9] One aspect of

[9] Indeed, wrongful discharge claims continue to be subject only to limited judicial review. See *Sampson* v. *Murray*, *supra*,

this broad discretion is the long-standing rule that a federal employee is entitled to receive only the salary of the position to which he was appointed, notwithstanding that he may have performed the duties of another position or the claim that he should have been placed in a higher grade. See, *e.g.*, *United States* v. *McLean*, *supra*, 95 U.S. at 753; *Ganse* v. *United States*, 376 F. 2d 900, 902, 180 Ct. Cl. 183, 186; *Tierney* v. *United States*, *supra*, 168 Ct. Cl. at 80-81; *Amundson* v. *United States*, 120 F. Supp. 201, 202, 128 Ct. Cl. 80, 82; *Price* v. *United States*, 80 F. Supp. 542, 543, 112 Ct. Cl. 198, 200; *Dvorkin* v. *United States*, 101 Ct. Cl. 296, 297, certiorari denied, 323 U.S. 730; *Coleman* v. *United States*, 100 Ct. Cl. 41, 43; *Brech* v. *United States Immigration & Nat. Service*, 362 F. Supp. 914, 917 (S.D. N.Y.).[10]

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415 U.S. at 74; *Grover* v. *United States*, 200 Ct. Cl. 337, 343; *Morelli* v. *United States*, 177 Ct. Cl. 848, 858; *Dargo* v. *United States*, 176 Ct. Cl. 1193, 1198-1199; *Hopper* v. *United States*, 176 Ct. Cl. 172, 176; *Gibson* v. *United States*, 176 Ct. Cl. 102, 108-110.

[10] The fact that respondents do not have any substantive right to recover money damages from the United States for the period of their allegedly wrongful classifications, while negating jurisdiction in the Court of Claims under the Tucker Act, does not necessarily mean of course that no court has jurisdiction over respondents' claims for equitable relief. In that connection, it should be noted that on September 16, 1971, respondents filed an action for mandamus in the United States District Court for the Eastern District of Pennsylvania, seeking an order directing the Civil Service Commission to reclassify their positions to grade GS-14. *Testan and Zarrilli* v. *Hampton, et al.* (Civil Action No. 71-2250). This suit was discontinued by respondents, without prejudice, on March 22, 1972. The district court's jurisdiction to grant the equitable relief sought by respondents would presumably be dealt with should the suit in the Eastern District be reactivated.

Had Congress intended to depart from this long-standing rule, it could have done so in either the Classification Act or the Back Pay Act. The absence of any provision in either Act specifically doing so can only be interpreted as evidence of Congress' intention not to permit suits for back pay in the present circumstances. This conclusion is fortified by the fact that in the Back Pay Act Congress did provide for money damages for improper discharges of federal employees but not for improper classifications. Consequently, even if it were appropriate to ignore the doctrine of sovereign immunity here, the Court of Claims would still have been without jurisdiction since the available evidence indicates that Congress did not intend to create a substantive right to back pay for the period of a wrongful civil service classification.

In reaching a contrary conclusion, the majority of the Court of Claims held that the pivotal jurisdictional issue was whether respondents were legally entitled to a higher position (Pet. App. A, p. 2a). The court did not then hold that respondents are entitled to the promotion they are seeking, but simply remanded the matter to the Civil Service Commission for further proceedings. If the Civil Service Commission were to find upon remand that respondents are entitled to promotion, the Court of Claims would presumably be prepared on appropriate motion to

enter an award of money damages in respondents' favor for the amount of whatever back pay they lost during the period of their wrongful classifications.

If there were any statutory authority for the award of back pay in the circumstances presented by this case, we would have no quarrel with the procedural means chosen by the court to determine the issue of respondents' legal entitlement to higher positions than those to which they were appointed. The Remand Statute, Pub. L. 92-415, 86 Stat. 652,[11] authorizes the Court of Claims (1) to issue "orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records" to complement the relief afforded by a money judgment; and (2) "to remand appropriate matters" to administrative or executive bodies or officials "with such direction as [the court] * * * may deem proper and just" in cases already "within its jurisdiction." The Remand Statute does not empower the court to remand a case for further administrative proceedings, however, where—as here—the claimants have no hope of ever establishing any substantive right against the United States for "actual, presently due money damages." More simply stated, the Remand Statute applies only to cases already "within [the court's] * * * jurisdiction", and this is not such a case.[12]

[11] The Remand Statute is codified as part of 28 U.S.C. (Supp. III) 1491.

[12] When the Remand Statute was being considered by the Ninety-Second Congress, the language of the proposed legislation was narrowed in order to meet the Department of Justice's objection that the bill should make clear that Congress was not broadening the jurisdiction of the Court of Claims or conferring general authority on that court to issue the full panoply of remedies available to the federal district courts. See S. Rep. No. 92-1066, 92d Cong., 2d Sess., pp. 2, 4, 5 (1972); H.R. Rep. No. 92-1023, 92d Cong., 2d Sess., pp. 5, 6 (1972); Hearings on H.R. 12979 and H.R. 12392 before a Subcommittee of the House Committee on the Judiciary, 92d Cong., 2d Sess., pp. 114, 116, 119-128 (1972). The language of the Remand Statute, as ultimately enacted, closely tracks that of the amended bill suggested by the Department of Justice. See Hearings on H.R. 12979 and H.R. 12392, *supra*, at 124. The Senate and House Reports on Pub. L. 92-415 expressly confirm the understanding of Congress that the Remand Statute "does not extend the class of cases over which the Court of Claims has jurisdiction" (S. Rep. No. 92-1066, *supra*, at 1; H.R. Rep. No. 92-1023, *supra*, at 3).

The only authority cited by the majority of the Court of Claims in support of its assumption of jurisdiction over respondents' claims are several recent Court of Claims decisions, dealing for the most part with claims of racial discrimination in federal employment or promotions (see Pet. App. A, p. 2a).[13]

[13] *Selman* v. *United States*, 498 F. 2d 1354, 204 Ct. Cl. 675, did not involve a claim of racial discrimination in federal employment but a claim that the Navy, for reasons without a statutory predicate, had not paid several Assistant Judge Advocates General at their respective levels of entitlement. In holding in favor of the plaintiffs, the Court of Claims relied upon the following statutory provision (37 U.S.C. 202(*l*):

> Unless appointed to a higher grade under another provision of law, an officer of the Navy or Marine Corps serving as Assistant Judge Advocate General of the Navy is entitled to the basic pay of a rear admiral (lower half) or brigadier general, as appropriate.

There is no such mandatory provision in either the Classification Act or the Back Pay Act.

Only one of those cases (*Bookman* v. *United States*, 453 F. 2d 1263, 197 Ct. Cl. 108) involved a claim that a wrongfully classified federal employee was entitled to back pay under the Classification Act, however, and the Court of Claims did not there discuss the issue of its jurisdiction. In none of the cases cited by the court, moreover, did the court discuss the jurisdictional significance of the Back Pay Act. As a consequence, even if those cases were properly decided [14] they are readily distinguished from and do not control the present case.

In summary, the Court of Claims erred in assuming jurisdiction over the respondents' contentions since neither the Classification Act nor the Back Pay Act creates a substantive right to back pay for the period of their allegedly wrongful classifications. Since respondents do not now, nor will they at any time in the future, have any chance of establishing a right to "actual, presently due money damages," the Court of Claims should have dismissed their petition rather than remanding the case to the Civil Service Commission.

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[14] But see *Ogletree* v. *McNamara*, 449 F.2d 93 (C.A. 6); *Gnotta* v. *United States*, 415 F. 2d 1271 (C.A. 8), certiorari denied, 397 U.S. 934; *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F. 2d 451 (C.A.D.C.), certiorari denied, 382 U.S. 978; *Congress of Racial Equality* v. *Commissioner*, 270 F. Supp. 537 (D. Md.).

II. The Classification Act Does Not Require That The Positions Held By Respondents Be Compared With Those Of Employees In Another Agency

The Court of Claims also misinterpreted the substantive provisions of the Classification Act in remanding this case to the Civil Service Commission, for the latter to compare the positions held by respondents with those of employees with higher classifications in another federal agency. The Classification Act requires that civil service positions be classified by reference to a general set of classification standards. Each position is required to be placed in the appropriate class on the basis of "the duties and responsibilities of the position and the qualifications required by [its] duties and responsibilities" (5 U.S.C. 5106(a)); and each class is required to be placed in the appropriate grade on the basis of "the level of difficulty, responsibility, and qualification requirements of the work of the class" (5 U.S.C. 5106 (b)).

The Classification Act further provides that the initial classification of particular positions into the appropriate class and grade is the responsibility of federal employing agencies. 5 U.S.C. 5107. The Civil Service Commission, on the other hand, is required under the Act "after consulting the agencies, [to] prepare standards for placing positions in their proper classes and grades." 5 U.S.C. 5105(a). The Commission is also required "from time to time [to] review such number of positions in each agency as will enable [it] to determine whether the [employing] agency is placing positions in classes and grades in

conformance with or consistently with published standards." 5 U.S.C. 5110(a). If upon such review the Commission finds that a position has not been properly classified by the employing agency, the Commission has authority under the Act to reclassify the position in accordance with the Commission's published standards. 5 U.S.C. 5110(b). If the Commission finds in addition that an agency or a part of an agency is not adhering to the Commission's published standards, it may "require that prior approval of the Commission be secured before an action placing a position in a class and grade becomes effective for payroll and other personnel purposes." 5 U.S.C. 5111(a).

In addition to the general reviewing authority given the Commission under the Classification Act, which is normally exercised by the Commission *sua sponte* as part of its continuing responsibility to monitor the overall operation of the civil service classification system, the Commission is required under the Act to review the appropriateness of particular classifications whenever an affected employee requests that the Commission do so. 5 U.S.C. 5112(b). In the event of such an appeal to the Commission—such as that filed by respondents in this case—the Commission has the authority to ascertain the duties, responsibilities and qualification requirements of the position or positions involved and, ultimately, may "change a position from one class or grade to another class or grade when the facts warrant." 5 U.S.C. 5112(a)(4).

In ordering the Commission to compare the positions held by respondents with the positions held by employees with higher classifications in another federal agency, the Court of Claims ignored several essential features of this classification system. It has in effect, moreover, required the Commission to employ a classification method that Congress rejected when it adopted the present Classification Act.

Prior to enactment of the Classification Act of 1923, salaries in the federal civil service were set by reference to "title of position" only. See Report of the Congressional Joint Committee on Reclassification of Salaries, H.R. Doc. No. 686, 66th Cong., 2d Sess., pp. 44, 49 (1920). There were no general standards for paying federal employees uniformly according to the duties, responsibilities and qualifications involved in their respective positions. See generally, *id.* at 18-21, 31-60. The only available guide—in a confused and disjointed system where "[t]he rates of compensation of some positions [were] fixed by general statute, in other cases by the annual appropriation acts, and in still other cases by individual executive or administrative action" (*id.* at 44) —were *ad hoc* comparisons of particular positions. See *id.* at 44, 49; S. Rep. No. 486, 67th Cong., 2d Sess., p. 15 (1922); 62 Cong. Rec. 421 (1921) (remarks of Congressman Mann).

The marked defects of this comparison system led Congress to enact the Classification Act of 1923 (42 Stat. 1488). See S. Rep. No. 486, *supra*, at 4, 6-9, 15, 19-20; H.R. Rep. No. 461, 67th Cong., 1st Sess.,

pp. 1-2 (1921). That Act represented an attempt to bring order into civil service salary schedules by establishing generally-applicable classification standards and setting uniform salary levels based upon those standards. See *ibid.*; 61 Cong. Rec. 7723, 7724 (1921); 62 Cong. Rec. 334 (1921) (remarks of Congressman Lehlbach); 61 Cong. Rec. 7726, 7826 (1921) (remarks of Congressman Black). The Classification Act of 1949 (63 Stat. 954) simplified the administrative procedures for classifying federal civil service positions [15] and vested increased responsibility in the Civil Service Commission for establishing detailed classification standards, but it retained and reinforced the basic mechanism for ensuring uniformity: the requirement that particular civil service positions be classified by reference to the Commission's generally-applicable standards, rather than on the basis of position-to-position comparisons. See 63 Stat. 958-959; S. Rep. No. 847, 81st Cong., 1st Sess., pp.

[15] The administration of the Classification Act of 1923 was initially vested in the former Personnel Classification Board, which was charged with responsibility for (1) promulgating regulations for "ascertaining and recording the duties of positions and the qualifications required of incumbents" (42 Stat. 1489) and (2) mandatory review of agency classification decisions (*ibid.*). The Civil Service Commission took over administration of the Classification Act in 1932, and it has issued public classification standards under the Act since July 1943. See S. Rep. No. 847, 81st Cong., 1st Sess., p. 5 (1949); Report of President's Committee on Civil Service Improvement, H.R. Doc. No. 118, 77th Cong., 1st Sess., p. 16 (1941). The Classification Act of 1949 made the Commission's review of agency classification decisions discretionary, rather than mandatory. Compare 63 Stat. 958-959 with 42 Stat. 1489.

26-28, 34-35 (1949); H.R. Rep. No. 1264, 81st Cong., 1st Sess., pp. 2-4, 8-10 (1949).

This method of classification was codified, without substantive change, in the Classification Act of 1966, 5 U.S.C. 5101, *et seq.* See H.R. Rep. No. 901, 89th Cong., 1st Sess., pp. 1, 3-4, 66-73 (1965); S. Rep. No. 1380, 89th Cong., 2d Sess., pp. 18-21, 86-92 (1966). The "equal pay for substantially equal work" principle in the Act (5 U.S.C. 5101(1)(A)) was not intended to require classification by comparison of positions, but constitutes rather a declaration of policy intended to guide the Commission in formulating generally-applicable classification standards.

The order entered by the Court of Claims in this case severely distorts the classification system created by the Classification Act. Instead of requiring that respondents' positions be classified by reference to generally-applicable standards promulgated by the Commission, as contemplated by Congress in the Classification Act, the Court of Claims' decision requires the Commission to engage in an *ad hoc* comparison of those positions with the responsibilities of and the functions performed by employees in another federal agency. The order, in effect, turns the Classification Act on its head by requiring the Commission to use as its referent in reviewing the appropriateness of respondents' classifications the classification decisions reached by a federal employing agency rather than the general classification standards.

An even more fundamental objection to the court's order, however, is that it will pose perhaps insuper-

able practical problems in the future—practical problems of which Congress was aware and which figured significantly in its decision not to require the Commission to engage in *ad hoc* comparisons of positions as a means of classification (see discussion, *supra*, at pp. 25-26). In the vast majority of cases, the employing agency, which has the initial classification responsibility (5 U.S.C. 5107), will not have access to the kind of detailed information that would be needed were it required to compare a particular position to be classified with positions in other federal agencies. And although the Commission may have such information, Congress did not intend that the Commission would review all classification decisions made by employing agencies. 5 U.S.C. 5110, 5112; 5 C.F.R. 511.603, *et seq.* Thus, the effective decision in most classification cases is made by a decision-making body (the employing agency) that is not equipped to make inter-agency comparisons of positions.

Quite apart from the fact that the Court of Claims failed to take into account the practical limitations upon the number of classification decisions that the Commission can feasibly review, it would distort the traditional functions and purposes of administrative review to require the Commission to make position-to-position comparisons in reviewing classification decisions made by federal employing agencies. Since those agencies do not have the resources to make such comparisons, review by the Commission would involve considerations not taken into account by the

initial decision maker. We submit that in the long run an *ad hoc*, jerry-built classification system of this sort would not be conducive to equitable classification since only those classification decisions reviewed by the Commission would be measured against the full range of considerations made appropriate by the Court of Claims' order.

To require inter-agency comparisons would also impose substantial additional administrative burdens upon the Commission. See H.R. Rep. No. 507, 66th Cong., 2d Sess., p. 2 (1919), noting burdens imposed upon the Joint Reclassification Commission by investigations of particular positions. Since there is no basis for assuming that the position or positions asserted to provide a referent for classification purposes are themselves properly classified, the Commission would have to undertake a detailed investigation of those positions prior to reviewing the classification being appealed. It is perhaps conceivable that Congress at some point will decide that the advantages of blanket inter-agency comparisons are worth the additional resources that would be required to perform them, and that it will provide the Commission with those additional resources; for the present, however, Congress has decided to the contrary.

In remanding this case to the Commission for further proceedings, the Court of Claims attempted to some extent to deal with these practical problems by noting that its holding was limited to the facts of the present case. Specifically, the court noted that

while it is "[o]rdinarily" not arbitrary and capricious for the Commission to refuse to make position-to-position comparisons, such comparisons were required here since the "employees all belong to a small readily manageable cadre, their jobs have a large nexus of duties shared in common, and the other employees [were] specifically pointed out by the complaining employees" (Pet. App. A, p. 2a). We submit that the court's holding is not as susceptible to principled limitation as the court appeared to imply, and that the practical difficulties discussed above cannot be so readily dismissed.

The Court of Claims' decision in this case encourages federal employees to seek to identify other federal employees with higher classifications whose duties are to some extent similar to their own. The court has left to the Commission, and to federal employing agencies in the first instance, the difficult task of determining how substantial the "nexus of duties shared in common" must be before the Commission is required to investigate the positions cited by the complaining employees and to engage in position-to-position comparisons. Since the similarity between various positions will always be a matter of degree, variable over time and depending fundamentally upon the exercise of judgment, the potential for friction in the classification process and for disputes unresolvable save through litigation is a very real difficulty inherent in the court's decision.

Finally, the Civil Service Commission's long-standing administrative interpretation confirms that the

Classification Act does not contemplate inter-agency comparisons of particular positions, whether on an *ad hoc* basis or as a matter of general review policy.[16] The comparison method is not provided for in the applicable classification standards published by the Commission. See General Attorney Series, GS-905-0 (App. 14-42). Those standards, as well as the Commission's other publications dealing with appropriate methods of classification of civil service positions, emphasize the need for classification by reference to generally-applicable standards promulgated by the Commission.[17] This consistent administrative inter-

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[16] Indeed, in light of the fact that Congress replaced the *ad hoc* "title of position" method of classification (see discussion, *supra*, at 25-26) with the general standards method of classification in the Classification Act, there is substantial doubt concerning the Commission's statutory authority to classify respondents' positions by reference to positions in another federal agency. Consequently, it can be argued with some force that the dispute here centers not on whether the Classification Act *requires ad hoc* position-to-position comparisons but whether it *permits* such comparisons.

[17] In January 1972 the Civil Service Commission completed a two-year study of job evaluation and pay systems in public jurisdictions and private industry. *Report of the Job Evaluation and Pay Review Task Force to the United States Civil Service Commission* (January 1972). As a result of that study, the Commission is now testing for possible implementation within the federal civil service a "factor ranking/benchmark" approach to job evaluation. Such an approach would combine three related classification techniques: (1) whole job or occupational ranking, (2) factor comparison and (3) point rating. While benchmark job descriptions would be used as one component of the "factor ranking/benchmark" approach, the job description would be specifically approved by the Commission and would be incorporated into the Com-

pretation by the Commission of its responsibilities under the Classification Act is entitled to weight in determining the meaning of that Act. See, *e.g.*, *Perkins* v. *Matthews*, 400 U.S. 379, 391; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Udall* v. *Tallman*, 380 U.S. 1, 16; *White* v. *United States Civil Service Commission*, 468 F. 2d 1357, 1358-1359 (C.A. 9); *Schellfeffer* v. *United States*, 343 F. 2d 936, 942, 170 Ct. Cl. 178, 187.

In summary, while a federal employee is entitled to have his classification reviewed by the Commission under generally-applicable standards, the Classification Act does not require that the Commission make *ad hoc* comparisons between the position being classified and positions in other agencies. The Commission found here, after careful review of all relevant information, that respondents were properly classified as GS-13s (App. 44-45, 101-102). There is no warrant in the Classification Act for requiring a comparison between respondents' positions and the A.F.L.C. positions, and the Court of Claims erred in ordering the Commission to do so.

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mission's generally-applicable standards. See *Report of Project To Develop, Test, and Evaluate an Improved Approach to the Evaluation of Non-Supervisory Positions at GS-1 thru GS-15* (July 1974); *Instructions for Field Test of the Factor-Ranking/Benchmark Approach to the Evaluation of General Schedule Positions GS-1 thru GS-15* (October 1973); *Benchmark Position Descriptions for the Factor Ranking/Benchmark Approach to the Evaluation of General Schedule Positions GS-1 thru GS-15* (July 1973).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-753

UNITED STATES OF AMERICA, *Petitioner*

v.

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI,
Respondents

BRIEF FOR RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS

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IN THE

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No. 74-753

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v.

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI,
Respondents

BRIEF FOR RESPONDENTS

On Writ of Certiorari to the United States
Court of Claims

OPINION BELOW

The opinion of the Court of Claims is reported at 499 F.2d 690, 205 Ct.Cl. 330 (1974).

STATUTE AND RULES INVOLVED

Public Law 92-415, 86 Stat. 652:

AN ACT

To amend title 28, United States Code, section 1491, to authorize the Court of Claims to implement its judgments for compensation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the first paragraph of section 1491 of title 28, United States Code, is amended by adding thereto the following:

"To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."

SEC. 2. This Act shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment.

Approved August 29, 1972.

Court of Claims Rule 131(c)(1)(2):

(c) *Separate Determination of Liability:* (1) stipulation of the parties, subject to approval by the commissioner, or upon order of the commissioner, a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery, if any, for further proceedings.

(2) In any case, whether or not a stipulation or order has been made under subparagraph (1) of this paragraph (c), the court, upon entering judgment that a party is entitled to recover, may reserve determination of the amount of the recovery for further proceedings. In such event, the judgment on the question of the right to recover shall be final, subject to proceedings had under Rules 151 and 152. Upon the entry of any such final judgment on the right to recover, the commissioner shall proceed with the determination of the amount of recovery. The parties may be allowed

a reasonable time within which to stipulate or otherwise agree upon a computation. (*Cf.* Rule 75.) If the parties are unable to agree on the amount of recovery, this issue shall be disposed of in accordance with the rules covering pretrial procedures, trial, exceptions, briefs, and argument.

Court of Claims Rule 149(a) and (b):

(a) Issuance of Remand Order: At the request of a party or on its own motion, the court may in any case within its jurisdiction by order remand appropriate matters to any administrative or executive body or official, with such direction as may be deemed proper and just.

(b) Content of Remand Order: An order of remand shall (1) delineate the area of further consideration or action deemed warranted on the remand, and (2) fix the extent to which, and the duration of the period (not to exceed 6 months) during which, court proceedings shall be stayed.

QUESTIONS PRESENTED

1. Has not the Court of Claims jurisdiction over Respondents' claims?

2. Having jurisdiction, was not the Court of Claims authorized to remand the case to the Civil Service Commission with proper directions?

STATEMENT

Respondents, trial attorneys in the office of counsel, Defense Personnel Support Center, Defense Supply Agency, represent the Government in appeals brought before the Armed Services Board of Contract Appeals. The respondents have contended throughout this proceeding, first, that their positions are independently entitled to classification GS-905-14 by application of the standards expressed in General Attorney Series GS-905-0 and, second, that their positions are substantially identical to those held by trial attorneys at the Contract Appeals Division, Office of Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Dayton, Ohio. The respondents are trial attorneys representing the Government in appeals brought before the Armed Services Board of Contract Appeals under the Disputes article found in all Government contracts.

The Armed Services Board of Contract Appeals serves under the standard contract disputes clause as the authorized representative of the Secretaries of Defense, Army, Navy, and Air Force, to hear and determine appeals from contracting officers' decisions on disputes arising out of contracts between defense agencies and Government contractors. The contractors may represent themselves or retain counsel. The Government is represented by counsel from the procurement directorate of the defense component which entered into the particular Government contract, and respondents represent the Government before the Armed Services Board of Contract Appeals in all appeals originating out of Defense Personnel Support Center contracts.

The Defense Personnel Support Center, Office of Counsel-trial section, consisted of respondents at Grade GS-905-13. Cases are assigned to respondents on a random basis.

At the Air Force Logistics Command there was a director, a deputy director, and three divisions of trial

attorneys. The six civilian trial attorneys comprise two graded GS-905-15, three graded GS-905-14, and one graded GS-905-13. The two GS-15's are called senior trial attorneys who handle the most difficult and complex cases. The three GS-14's are subject to the division chief 's administrative supervision but receive no direct professional supervision. The one GS-13 receives both administrative and professional supervision from the division chief.

The position descriptions at the Defense Personnel Support Center and at the Air Force Logistics Command are strikingly similar; the major responsibility being preparation and execution of a trial of an appeal before the Armed Services Board of Contract Appeals. Whereas the Air Force Logistics Command GS-15 is for "most difficult and most important cases," respondents handle any type of case at the Defense Personnel Support Center, without preselection. Whereas at the Air Force Logistics Command the GS-14 attorneys handle the cases remaining after the "most difficult" have been selected out for the GS-15's, there is no appreciable difference between a comparison of respondents' position descriptions GS-905-13, with the corresponding position descriptions GS-905-14 at the Air Force Logistics Command, other than that respondents also handle the "most difficult" cases. Both require the trial attorney to conduct pretrial proceedings, prepare and file all necessary legal papers, review and evaluate the facts, participate in pretrial hearings, conduct legal research, interview and select factual and expert witnesses, brief and argue all motions, represent the Government at trial, using techniques and legal theories based on their own independent judgment, submit post trial briefs, determine whether and when a case is appropriate for settlement, and, if it is, to negotiate and execute such settlements.

The differences between the positions descriptions are insignificant. The Air Force Logistics Command GS-905-14 position includes the furnishing of legal advice to contracting officers on decisions rendered before an appeal is taken, and the respondents, as the record shows, perform

that pretrial function also. Respondents' position descriptions also mention reviewing Armed Services Board of Contract Appeals' decisions to determine whether reconsideration motions should be filed (App. 48).

It was the trial judge's decision that if there were any differences between the position descriptions, they favored the respondents (App. 48).

The basis for classification under the General Attorney Series is to evaluate two factors: the difficulty of the work assignments, and the degree of responsibility. This evaluation involves a comparison of the position description wording against The General Attorney Series wording. The position descriptions for grade GS-14 at both the Defense Personnel Support Center and the Air Force Logistics Command are virtually the same. The Trial Judge's review of the factors and the series aptly demonstrate respondents' entitlement to grade GS-905-14 (App. 49-54).

As the trial judge states (App. 54), when one has finally navigated the seas and shoals of words and phrases represented by the General Attorney Series and the position descriptions, the simple fact remains that respondents are responsible for performing as trial attorneys for the Government before the Armed Services Board of Contract Appeals; handling cases assigned without discrimination as to their relative difficulty or complexity, including the "most difficult." All appeals heard by the Board originate out of Defense Department contracts governed by the same basic procurement statutes, regulations, and standard contract forms and clauses. The Board's rules apply to all appeals docketed, and opinions resulting from respondents' efforts are eligible for citation in any Armed Services Board of Contract Appeals brief.

The particular commodity being procured by the Government is of relatively little importance in evaluating the difficulty and complexity of the case since legal precedents are blind to the subject matter of the contract (App. 54) and, in any event, the Defense Personnel Support Center procures food, clothing and medical supplies throughout

the Defense Department as well as to other non-defense Federal departments. The trial judge points out that the differences in grade more readily reflect attitude and the aptitude of the classifier in the art of hyperbole, and some classifiers read the same words differently than others (App. 55).

Respondents instituted this suit in the United States Court of Claims claiming entitlement to reclassification as Trial Attorneys GS-905-14 and the recovery of back pay as Trial Attorneys GS-905-14 since May 8, 1970 (App. 10, 11).

Under the General Attorney Series, positions are rated on the basis of two factors: difficulty of work assignments and the degree of responsibility. The trial judge of the Court of Claims ruled that there was essentially no difference between Trial Attorneys from the Air Force and the Trial Attorneys from the Defense Personnel Support Center, and that their positions could be interchanged without any problem arising. He determined that the respondents were entitled to classification GS-905-14 and found the decision of the Civil Service Commission to be arbitrary and capricious.

The Court of Claims heard the case *en banc* and a per curium opinion adopted by Cowen, Chief Judge, Davis, Nichols, Kashiwa, Judges, ruled that the position of the Civil Service Commission was arbitrary and capricious; that there was no iron rule that the Court of Claims could not ever award the pay of a higher position to the incumbent of a lower one where the action complained of was arbitrary and capricious and not supported by substantial evidence, and remanded the case to the Civil Service Commission pursuant to Public Law 92-415, 86 Stat. 652, and Rule 149(b) to conduct further proceedings consistent with the Court's decision to insure that the mandate of the statute, 5 U.S.C. 5101, calling for equal pay for equal work, was being complied with, so that the findings of the Agency, if newly and correctly made, would create a legal right which the Court of Claims could then enforce by a money judgment.

SUMMARY OF ARGUMENT

The Court of Claims has jurisdiction of the Respondents' claims since the Respondents are entitled to recover back pay since the action of the Civil Service Commission was arbitrary and capricious and not supported by substantial evidence and it is not necessary for the jurisdiction of the Court of Claims that the statute provide for a cause of action for compensation.

It has also been established that the Court of Claims, having jurisdiction, was authorized to remand the case to the Civil Service Commission with proper directions, that is, so as to make an adequate record, the Commission to report what, if any, discrepancy was between the Respondents' positions and the positions of the Air Force trial attorneys before the Armed Services Board of Contract Appeals, and so that the Court of Claims can assure itself that the mandate of the statute, 5 U.S.C. § 5101, calling for equal pay for equal work, was being complied with.

ARGUMENT

1. The Court Of Claims Had Jurisdiction Over Respondents' Claims.

The Court of Claims ruled in *Testan v. United States* (Pet. App. A, pp. 2a, 3a, 499 F.2d 690, 691 (1974):

> "We agree that the position of the CSC was arbitrary and capricious. Plaintiffs' case is built mainly on the classification of attorneys doing similar work for another agency. Plaintiffs try cases before the Armed Services Board of Contract Appeals (ASBCA). The comparison attorneys do so also, on behalf of the Air Force Logistics Command (AFLC) at Dayton, Ohio. The Commission flatly refused to consider them or their jobs. Ordinarily, we agree, it is not arbitrary and capricious to refuse to consider the grade of employees other than the one complaining. This case is peculiar in its facts. Where, as here, employees all belong to a small readily manageable cadre, their jobs have a large nexus of duties shared in common, and the other employees are specifically pointed out by the complaining employees, we deem the case to be different. There may be a perfectly good explanation for the apparent discrepancy. We think as a reviewing court we are entitled to be informed by the CSC what it is, and not to have to take it on faith or speculate about it. Otherwise, we are in no position to assure ourselves that the mandate of the statute, 5 U.S.C. §5101, (calling for equal pay for equal work), is being complied with. As the trial judge observes, the classification of lawyers is always difficult because of the spate of vague, subjective terminology in lawyer's job descriptions. We think, in the circumstances here involved, the grades of other lawyers representing other procuring agencies before the ASBCA provide an essential benchmark. Without consideration of them,

or at least some of them, no confidence can be felt that the statute has been obeyed.

"There is no iron rule that we cannot ever award the pay of a higher position to the incumbent of a lower one. We do that in *Selman v. United States*, 204 Ct.Cl. (decided June 19, 1974). *Compare, also, Jarett v. United States*, 195 Ct.Cl. 320, 451 F.2d 623 (1971). The question always is as to legal entitlement to the higher position. If entitlement depends on the exercise of discretion by someone else we cannot substitute our own discretion. *Allison v. United States*, 196 Ct.Cl. 263, 451 F.2d 1035 (1971); *Pettit v. United States*, 203 Ct.Cl. 207, 488 F.2d 1026 (1973). Here, as in *Pettit*, a remand under Pub. L. 92-415 affords the opportunity to employ the authority having the statutory discretion, to exercise it under proper directions. In *Bookman v. United States*, 197 Ct.Cl. 108, 453 F.2d 1263 (1972), we scrutinized the function of the CSC in classifying Government positions. We decided it was discretionary and not subject to our review except for arbitrary and capricious action or lack of support for a decision by substantial evidence. We adhere to that standard here. The theory of *Allison* and *Pettit*, however, was that the findings of the agency endowed with the discretion, if newly and correctly made, could create a legal right which we could then enforce by a money judgment. We did not consider our decisions therein to be merely declaratory, and neither is this one today.

"It is unnecessary to construe the Back Pay Act, 5 U.S.C. §5596, since, if it does not cover the situation here involved, neither does it limit the Tucker Act jurisdiction 28 U.S.C. §1491, as it previously existed. It was so held in *Allison* and *Pettit, supra*. Defendant would in effect refuse any judicial review to a person perhaps denied equal pay for equal work in a job classification, in possible violation of 5 U.S.C. §5101. When Congress desires to achieve this result, it knows

how to do it. *See, Chambers v. United States*, 196 Ct.Cl. 186, 451 F.2d 1045 (1971).

"In accordance with the foregoing, we are constrained to differ with the trial judge both as to our supposed lack of power to award back pay and our supposed possession of power to direct the reclassification of the plaintiffs to Grade GS-14.

* * *

"ORDERED, as follows: The case is remanded to the CSC pursuant to Pub. L. 92-415, 86 Stat. 652, and the court's General Order No. 3 of 1972* implementing such statute, for it to conduct further proceedings consistent with this order. . . ."

*[General Order No. 3 has now been rescinded and replaced by new Rules 149 and 150 (see p. 3 *supra*)].

In *Odian v. United States*, 203 Ct.Cl. 306 (1973), the Court of Claims said at 322:

> "Section 101 of the Classification Act of 1949, ch. 782, 63 Stat. 954 [5 U.S.C. §5101 (1970)], provides in part:
>
> 'It is the purpose of this chapter to provide a plan for classification of positions and for rates of basic compensation whereby—
>
> '(1) In determining the rate of basic compensation which an officer or employee shall receive, (A) the principle of equal pay for substantially equal work shall be followed * * *.'
>
> ". . . It is clear from the language of the section, however, that Congress intended only that employees

doing the same level of work be paid the same basic rate of compensation. To achieve this end, Congress appears to have established an organized system for classifying positions by grade, based upon the nature of the work, the qualifications required, and the varying levels of difficulty and responsibility. In Title VI of the Act, Congress established 'Basic Compensation Schedules' including the General Schedule (GS) which was divided into grades one through 18. Each grade represents a different level of difficulty and responsibility. The 'rate of basic compensation' in section 101 clearly refers to the grade level within the basic compensation schedule. Employees working at the same levels of difficulty and responsibility (but in different jobs) are to be assigned the same grade and therefore to be paid in accordance with the same basic rate of compensation."

Clearly, these decisions are correct since in *Selman v. United Sates*, 204 Ct.Cl. 675, 498 F.2d 1354 (1974), the plaintiffs there claimed entitlement to Rear Admiral (lower half) pay for their services as Assistant Judge Advocates General of the Navy while occupying only the rank of Captain, and the Court of Claims ruled that the plaintiffs were entitled to the rank of Rear Admiral (lower half) pay and remanded the case for determination of the amount of recovery pursuant to Rule 131(c). In *Greene v. United States*, 376 U.S. 149, 153 (1964), the Court of Claims, applying the doctrine of exhaustion of administrative remedies, ordered proceedings "suspended pending pursuit of administrative remedies [made available] by the Department of Defense." And see *Kreznar & Spector v. United States*, 376 U.S. 221 (1964). In *Jarett v. United States*, 195 Ct.Cl. 320, 451 F.2d 623 (1971), the Court of Claims in a suit by faculty members of the Merchant Marine Academy ruled that they were entitled to a higher rating and granted the plaintiffs' motion for summary judgment and suspended proceedings to enable the Maritime Administration officials to consider the faculty members' request. In *Allison v.*

United States, 196 Ct.Cl. 263, 451 F.2d 1035 (1971), the Court of Claims considered Wage Board employees in a back pay case where the Board of Appeals and Review of the Civil Service Commission had determined the Wage Board employees not to be entitled to recovery, and suspended proceedings to allow the Wage Board employees:

> ". . . to apply for administrative findings which shall show, person by person, whether such person would have been promoted, when, and to what grade or grades, in light of such person's qualifications, the qualifications of competitors, the existence of vacancies, the availability of funds, and all other factors that would have properly influenced the exercise of discretion in the making of an actual promotion at the time a promotion was due. *Cf. Drucker v. United States*, 195 Ct.Cl. 335, 451 F.2d 619 (1971)."

In *Drucker v. United States*, 195 Ct.Cl. 335, 451 F.2d 619 (1971), the Court of Claims was again concerned with faculty members of the Merchant Marine Academy and the Court of Claims ruled them entitled to recover, suspending further action so that proper officials of the Maritime Administration might consider the category into which the faculty members were entitled to be placed.

The action of the Court of Claims in granting a judgment on the issue of liability, leaving for further determination the amount of damages when a new judgment is entered in such amount, is well established: *Caltex (Philippines), Inc. v. United States*, 120 Ct.Cl. 518, 100 F.Supp. 970 (1951), where the Court of Claims held plaintiffs entitled to recover for the taking of the terminal facilities and the petroleum products, with the exact amounts being reserved for further proceedings.

In *Central Eureka Mining Co. v. United States*, 134 Ct.Cl. 1, 53, 138 F.Supp. 281, 310 (1956), the Court of Claims ruled that the plaintiffs there had established their right to recover just compensation for a temporary taking of their gold mining properties, and remanded the cases

to a Commissioner of the Court of Claims for trial on the question of damages. This action was recognized and approved by the Court in *United States v. Caltex*, 344 U.S. 149 (1952), as well as in *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

Petitioner contends to the Court that the Classification Act and the Back Pay Act of 1966 do not grant any action to the Respondents for back pay. But the Court of Claims in *Chambers v. United States*, 196 Ct.Cl. 186, 194, 451 F.2d 1045, 1050 (1971) said:

> "There is nothing novel about this court affording a monetary remedy to claimants on the strength of Executive Orders and administrative regulations not expressly so providing. Under the doctrine of *Service v. Dulles*, 354 U.S. 363 (1957), we have many times awarded back pay to plaintiffs, both military and civilian, who demonstrated a violation of procedural rights guaranteed to them by valid departmental regulations. *Glidden v. United States*, 185 Ct.Cl. 515 (1968); *Fletcher v. United States*, 183 Ct.Cl. 1, 392 F.2d 266 (1968); *Greenway v. United States*, 175 Ct.Cl. 350 (1963), *cert. denied*, 385 U.S. 881, *reh. denied*, 385 U.S. 954 (1966); *Daub v. United States*, 154 Ct.Cl. 434, 292 F.2d 895 (1961); *Starzec v. United States*, 145 Ct.Cl. 25 (1959); *Watson v. United States*, 142 Ct.Cl. 749, 162 F.Supp. 755 (1958). In *Watson*, the court noted at 756, 162 F.Supp. at 758:
>
> "* * * that neither Service nor Watson was claiming a violation of any procedural rights guaranteed by any statute whatever, but rather the violation of rights guaranteed by departmental regulations. If the regulations issued under the executive orders, which in turn were issued under the 1883 Civil Service Act, in the case of *Service* had the force and effect of law, and a discharge carried out contrary to the provisions of these regulations was therefore an

> invalid discharge, it is difficult to understand why the Watson discharge in violation of another regulation issued under the same 1883 Act, was not equally invalid.' "

In *Daub, supra*, the Court noted 154 Ct.Cl. at 437-38, 292 F.2d at 897-98:

> "The Government points out that the plaintiff was a temporary employee who had no status either in the competitive civil service, or as a veteran. But, as we have shown, the Army had, by regulation, conferred upon its employees, including its employees who had no rights under the Lloyd-LaFollette Act or the Veterans' Preference Act, the right to prescribed rational and uniform treatment with regard to their status as employees. * * *

In *Simon v. United States*, 113 Ct.Cl. 182, 190-91 (1949), the court said:

> "* * *. It is not necessary, to the jurisdiction of this court to render a money judgment based upon rights conferred, that the statute, contract, or regulation upon which the claim is founded contain a provision that denial of a legal right thereunder shall give rise to a cause of action for compensation or damages. This matter is taken care of by the broad jurisdiction conferred by §1491, U.S.C., Title 28, *supra*. *United States v. Wickersham*, 201 U.S. 390."

There is a further reason for the Court of Claims having jurisdiction of this case viz. discrimination against Respondents. In *Chambers v. United States*, 196 Ct.Cl. 186, 451 F.2d 1045 (1971), the Court of Claims was concerned with racial discrimination. Here, discrimination is between the Air Force Logistics Command trial attorneys on the one hand, and the Defense Personnel Support Center trial

attorneys on the other hand. The Court of Claims in the *Chambers* case ruled that the Executive Order providing equal opportunity and prohibiting discrimination because of race, provided a legal basis for awarding back pay to an *applicant* for Federal employment.

A violation of procedural rights guaranteed by valid departmental regulations entitles Respondents to claim back pay: *Service v. Dulles*, 354 U.S. 363 (1957); *Glidden v. United States*, 185 Ct.Cl. 515 (1968); *Fletcher v. United States*, 183 Ct.Cl. 1, 392 F.2d 266 (1968); *Greenway v. United States*, 175 Ct.Cl. 350 (1963), *cert. denied*, 385 U.S. 881, *reh. denied*, 385 U.S. 954 (1966); *Daub v. United States*, 154 Ct.Cl. 434, 292 F.2d 895 (1961); *Starzec v. United States*, 145 Ct.Cl. 25 (1959); *Watson v. United States*, 142 Ct.Cl. 749, 162 F.Supp. 755 (1958).

This is not the issue of a claimant seeking the pay of a higher paid position because he performs the duties of such position as in *United States v. McLean*, 95 U.S. 750 (1877); *Amundson v. United States*, 128 Ct.Cl. 80, 120 F.Supp. 201 (1954); *Price v. United States*, 112 Ct.Cl. 198, 80 F.Supp. 542 (1948); and *Dvorkin v. United States*, 101 Ct.Cl. 296, *cert. denied*, 323 U.S. 730 (1944). *See also, Ganse v. United States*, 180 Ct.Cl. 183, 376 F.2d 900 (1967).

As the Court of Claims pointed out in *Chambers v. United States, supra*, since *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), the distinction between discretionary acts and ministerial acts has been recognized. But even as to discretionary acts, an administrative officer might exceed his authority by making a determination which is arbitrary or capricious or unsupported by evidence: *Dismuke v. United States*, 297 U.S. 167, 172 (1936), and that standard has been used in back pay cases: *Blackmar v. United States*, 173 Ct.Cl. 1035, 354 F.2d 340 (1965). The Court of Claims ruled that the plaintiff *Chambers* was entitled to recover back pay from March 17, 1967, the date when she should have been hired, until March 9, 1970, the date she was employed, less any amounts she might have earned in the interim.

It is submitted that that is this case. There is in law no difference between types of discrimination, whether it be race, color, religion, sex, or national origin, or between the Air Force Logistics Command trial attorneys and the Defense Personnel Support Center trial attorneys.

And see *Small v. United States*, 200 Ct.Cl. 11, 470 F.2d 1020 (1972); *Allison v. United States*, 196 Ct.Cl. 263, 451 F.2d 1035 (1971).

In the concurring opinion by Judge Davis, *Chambers v. United States, supra*, 196 Ct.Cl. at 203, 451 F.2d at 1055, it was pointed out that the substantial evidence was that the plaintiff *Chambers* had been discriminated against, and in this case the trial judge has found that the plaintiffs here have been discriminated against (App. 57).

Price v. United States, 112 Ct.Cl. 198, 80 F.Supp. 542 (1948), is cited in *Chambers v. United States, supra*, 196 Ct.Cl. at 196, 451 F.2d at 1051, for the principle that one cannot sue for a salary of a position which was never held although the claimant performed the duties of that position. *Coleman v. United States*, 100 Ct.Cl. 41 (1943), is similarly distinguished in *Chambers v. United States, supra*, 196 Ct.Cl. at 196, 451 F.2d at 1051, as is *Dvorkin v. United States*, 101 Ct.Cl. 296, *cert. denied*, 323 U.S. 730 (1944), and likewise *Ganse v. United States*, 180 Ct.Cl. 183, 376 F.2d 900 (1967), and similarly *Tierney v. United States*, 168 Ct.Cl. 77 (1964). *Jarett v. United States*, 195 Ct.Cl. 320, 451 F.2d 623 (1971), concerned *ex parte* statements considered in the administrative decision and action taken in contravention of established regulations contrary to *Camero v. United States*, 170 Ct.Cl. 490, 345 F.2d 798 (1965), and *Service v. Dulles*, 354 U.S. 363 (1957). *Nordstrom v. United States*, 177 Ct.Cl. 818 (1966), is cited in *Jarett v. United States, supra*, 195 Ct.Cl. at p. 329, for the statement: "Plaintiff is not seeking a promotion—he is seeking the benefits incident to a reclassification, an automatic action which applied to everyone." Accordingly the cases cited by petitioner in its brief at 18, are nc authoritative here. This case is ruled by *Chambers v.*

In *Allison v. United States*, 196 Ct.Cl. 263, 451 F.2d 1035 (1971), the Court of Claims pointed out that in *Chambers v. United States, supra*, it had decided that the Executive Orders there cited provide authority for awarding back pay in racial discrimination cases, but that it was not necessary to consider whether the Back Pay Act, 5 U.S.C. §5596, also provides a remedy. It is submitted that the Back Pay Act does so provide in this case since Respondents here complain that they *have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay* of a trial attorney GS-14, since the Trial Judge has *concluded that the refusal to reclassify plaintiffs* [respondents] *to GS-14 is arbitrary, discriminatory, and is not supported by substantial evidence* (App. 57), and the first such refusal was on May 8, 1970 (App. 92). See *Walker v. Kleindienst*, 357 F.Supp. 749 (1973).

Accordingly, it must be concluded that the Court of Claims has jurisdiction over Respondents' claims.

2. The Court of Claims Having Jurisdiction Was Authorized to Remand the Case to the Civil Service Commission With Proper Directions.

What the Court of Claims did here was to remand the case to the Civil Service Commission pursuant to P.L. 92-415, 86 Stat. 652, and then General Order No. 3 of 1972 (now Rule 149(b)), consistent with the Court of Claims per curiam opinion. By such opinion the Court of Claims found the position of the Civil Service Commission to be arbitrary and capricious and that the Civil Service Commission should comply with the mandate of the statute 5 U.S.C. §5101, calling for equal pay for equal work. The Court of Claims having found the grades of other lawyers representing other procuring agencies before the Armed Services Board of Contract Appeals, to provide an essential

bench mark and further that without consideration of them, no confidence could be felt that the statute had been obeyed.

We have demonstrated that the Court of Claims has jurisdiction. There can be no doubt that the Order of the Court of Claims was proper. The statute, 92-415, 86 Stat. 652, *supra*, provides:

> ". . . In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."

Senate Report No. 92-1066, on P.L. 92-415, U. S. Code Congr. & Adm. News, 92nd Congress, 2d Sess., 1972, Vol. 2, pp. 3116, 3120, reads on Sectional Analysis, as follows:

> "The second new sentence gives the Court of Claims the power to remand appropriate matters to any administrative or executive body or official with such directions as it may deem proper and just. The act thus provides the Court of Claims the necessary means to compel administrative or executive bodies to take further action where it is necessary to make an adequate record."

That is what the Court of Claims has done here. It has done no more nor less than the statute provides. It has remanded this case to the Civil Service Commission to take further action which the Court of Claims finds necessary to make an adequate record. It is found that as a reviewing Court the Court of Claims is entitled to be informed by the Civil Service Commission what the discrepancy is between Respondents' positions as Trial Attorneys before the Armed Services Board of Contract Appeals and the trial attorneys for the Air Force Logistics Command before the Armed Services Board of Contract Appeals. This is for the purpose of making an adequate record so that the Court of Claims can assure itself that the mandate of the statute, 5 U.S.C. §5101 calling for equal pay for equal work, is being

complied with, noting that the grades of other lawyers representing other procuring agencies before the Armed Services Board of Contract Appeals provide an essential bench mark.

Hence, the action of the Court of Claims in remanding the case to the Civil Service Commission was in accordance with the statute, 92-415, and followed the Sectional Analysis of the statute by Senate Report 92-1066.

CONCLUSION

It is respectfully submitted that it has been established that the Court of Claims has jurisdiction of the Respondents' claims and that under the statute, 92-415, 86 Stat. 652, since the case was within its jurisdiction, the Court of Claims had the power to remand the appropraite matters under the case to the Civil Service Commission with the directions which it gave *viz.* that the Civil Service Commission inform the Court as to what difference there was between the Respondents' positions as trial attorneys and the Air Force trial attorneys' practicing before the Armed Services Board of Contract Appeals so that an adequate record can be made and the Court of Claims can assure itself that the mandate of the statute, 5 U.S.C. §5101, calling for equal pay for equal work, was being complied with.

Accordingly this Court is requested to affirm the judgment of the Court of Claims.

Respectfully submitted,

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 74-753

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74–753

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

In our main brief we showed that the Court of Claims should have dismissed this suit for lack of jurisdiction and that, in any event, the Court of Claims erred in remanding the case to the Civil Service Commission with instructions that the Commission compare respondents' duties and classifications with those of other federal employees. We submit this reply brief to respond to various contentions made by respondents and the *amici curiae,* Melvin Allison, *et al.,* concerning the scope of the Court of Claims' jurisdiction.

THE COURT OF CLAIMS LACKED JURISDICTION TO ENTERTAIN THIS SUIT SINCE NEITHER THE CLASSIFICATION ACT NOR THE BACK PAY ACT PROVIDES A MONETARY REMEDY FOR THE PERIOD OF A WRONGFUL CLASSIFICATION

The central and, in our judgment, dispositive issue in this case is whether any federal statute expressly confers upon respondents a substantive right to recover money damages from the United States for the period of their allegedly wrongful civil service classifications. Since the scope of the Court of Claims' jurisdiction under the Tucker Act is limited to suits in which the claimant has a right to "actual, presently due money damages from the United States" (*United States* v. *King,* 395 U.S. 1, 3), the jurisdiction of the Court of Claims to entertain respondents' suit on its merits depended upon the existence of a statute—or combination of statutes—expressly waiving the traditional immunity of the United States from suits seeking money damages in the circumstances presented in respondents' complaint.

As demonstrated in our opening brief, the Tucker Act does not itself create any substantive right, enforceable against the United States, to "actual, presently due money damages" but merely confers jurisdiction on the Court of Claims whenever such a substantive right otherwise exists. We also demonstrated that the Classification Act, under which respondents claimed they had been wrongfully classified, does not contain any provision or provisions waiving the immunity of the United States to suits seeking back pay for the period of an improper classification.

Finally, although the Court of Claims did not address the issue, we showed that the Back Pay Act of 1966 does not apply to wrongful classification claims.

Thus, whether characterized as asserting a "lack of subject matter jurisdiction" or a "failure to state a cause of action upon which relief can be granted,"[1] we believe that the Court of Claims lacks authority to award money damages for the period of a wrongful federal civil service classification and that it should therefore have dismissed respondents' suit. In other words, the sole remedy of an employee who has been improperly classified is to obtain reclassification

[1] Some courts have held that there is no subject matter jurisdiction under the Tucker Act where the claimant, because of sovereign immunity, cannot establish a valid cause of action for money damages. *E.g.*, *Gnotta* v. *United States*, 415 F. 2d 1271, 1277–1278 (C.A. 8), certiorari denied, 397 U.S. 934. These cases reflect the view that sovereign immunity partakes of the nature of a jurisdictional bar (see *Edelman* v. *Jordan*, 415 U.S. 651, 677–678; *United States* v. *Sherwood*, 312 U.S. 584, 586–587), and that the Tucker Act does not confer subject matter jurisdiction in cases where there is no possibility of a money judgment.

Other courts have made a distinction in Tucker Act cases between subject matter jurisdiction and cause of action, suggesting that the requirement of subject matter jurisdiction might be satisfied if the claimant asserts a non-frivolous claim for money damages against the United States but that the claimant would still have to establish—on the merits—a cause of action for money damages. *E.g.*, *Jackson* v. *Lynn*, 506 F. 2d 233, 236–237 (C.A. D.C.); *Davis* v. *Romney*, 490 F. 2d 1360, 1370–1372 (C.A. 3).

But, at least in cases such as the present, the possible conceptual difference between subject matter jurisdiction and cause of action is without operative significance since, however characterized, the ultimate question presented in such cases is whether the immunity of the United States has been waived to the extent of providing for recovery in money damages. *Jackson* v. *Lynn*, *supra*, 506 F. 2d at 237 and n. 4; *Davis* v. *Romney*, *supra*, 490 F. 2d at 1371 n. 6.

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for the future; reclassifications operate only prospectively, and do not create any right to back pay for past improper classifications.

Respondents and the *amici* have advanced two major arguments in support of the Court of Claims' jurisdiction, both of which relate ultimately to whether a cause of action for money damages in wrongful classification cases can be found by implication or must be expressly authorized. First, the *amici* claim (Br. 6, 8–9, 11–12, 20) that the Tucker Act waives sovereign immunity to any claim invoking a constitutional provision or a federal statute or regulation, so that the only remaining inquiry in this case is whether a cause of action for money damages can be "implied" from the Classification Act. This argument is bottomed on what the *amici* say is a fundamental distinction between "a substantive right" to money damages from the United States and "a waiver of sovereign immunity." Second, respondents and the *amici* argue (R. Br. 14–15; A. Br. 6, 9, 20–26) that the violation of any statute or regulation governing federal employment automatically creates a cause of action against the United States for money damages. This is so, we are told, because to hold otherwise would leave "rights without remedies."

Neither of these contentions is well founded. The sweeping arguments made by respondents and the *amici,* if accepted, would effectively overrule the well-established rule against implying congressional authority to collect from the public treasury and would render superfluous the many federal statutes—such as

the Back Pay Act—that expressly provide for a money damage remedy against the United States in carefully limited circumstances. Even if it is assumed that a congressional waiver of sovereign immunity appropriately can be found by implication, moreover, the language of the statutes relied upon by respondents and the history of the relationship between the federal government and its employees show conclusively that Congress did not intend to permit the award of back pay in the circumstances presented in respondents' complaint. This does not mean that federal civil service employees are without means of redressing wrongful classifications: to the contrary, Congress prescribed in the Classification Act an elaborate set of administrative safeguards to ensure general uniformity in classifications and to provide prospective relief in individual cases.

A. THE TUCKER ACT DOES NOT CONSTITUTE A CONGRESSIONAL WAIVER OF THE IMMUNITY OF THE UNITED STATES FROM SUITS SEEKING MONEY DAMAGES FOR ALLEGEDLY IMPROPER CIVIL SERVICE CLASSIFICATIONS

The principal argument offered by the *amici* in support of the Court of Claims' jurisdiction to entertain respondents' suit is that the Tucker Act not only waives the immunity of the United States to any cause of action "founded * * * upon * * * any Act of Congress" but makes available as well any "generally accepted and important form of redress"—including redress in money damages (see Br. 7–11). This means, according to the *amici* (Br. 6), that "[t]he failure of the Classification Act of 1949 ex-

pressly to authorize suits in the Court of Claims for damages or to waive the sovereign immunity of the United States" does not bar that court from exercising jurisdiction over respondents' suit.

1. This Court has held repeatedly, however, that the Court of Claims' jurisdiction under the Tucker Act extends only to those claims that are "limited to actual, presently due money damages from the United States." *United States* v. *King, supra,* 395 U.S. at 3; accord, *e.g., Glidden Co.* v. *Zdanok,* 370 U.S. 530, 557; *United States* v. *Jones,* 131 U.S. 1, 18. As noted in our opening brief, the Tucker Act does not itself create any "entitlement" or substantive right, enforceable against the United States, to "actual, presently due money damages." The Tucker Act merely confers jurisdiction in the Court of Claims whenever such an entitlement or substantive right otherwise exists. See *Mosca* v. *United States,* 417 F. 2d 1382, 1386, 189 Ct. Cl. 283, 290; *Eastport S.S. Corp.* v. *United States,* 372 F. 2d 1002, 1007–1009, 178 Ct. Cl. 599, 605–607; Developments in the Law, *Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 882 (1957).

It is also settled that the existence of a substantive right to a money damage remedy against the United States depends wholly upon the extent to which the United States has waived its immunity. *E.g., United States* v. *Sherwood,* 312 U.S. 584, 586. In cases such as the present, in which the claimant does not base his claim upon a contract or seek the return of money that he has paid over to the government, the as-

serted entitlement to money damages depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport SS. Corp* v. *United States, supra,* 372 F. 2d at 1009; accord, *Mosca* v. *United States, supra,* 417 F. 2d at 1386.[2]

[2] The Tucker Act specifies that a claim of entitlement to money damages must be "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" (28 U.S.C. 1491). So far as noncontractual cases are concerned, the Court of Claims has said that claims of entitlement to money damages usefully may be grouped into two rough categories: "those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Eastport S.S. Corp.* v. *United States, supra,* 372 F. 2d at 1007; see also *Clapp* v. *United States,* 117 F. Supp. 576, 580, 127 Ct. Cl. 505, 512.

Where a claimant seeks the return of his own money, alleged to have been wrongfully collected and withheld by the government, the claimant's recovery would draw upon a "fund" created by the claimant himself. The interests of the general citizenry in preservation of the public fisc are only incidentally involved in such cases since, if wrongfully collected and withheld, the money paid to the government by the claimant could not in theory properly be dispersed to defray the cost of government operations. By contrast, where the claimant seeks recovery from the general public treasury of monies not directly derived from payments by him, his recovery would draw upon a "fund," derived from all the citizenry, that exists only because of the lawful exercise of the government's power to collect and retain money from all the people. In the latter class of cases, therefore, express congressional authority "mandating compensation" is required before the claimant may recover. See, *e.g., Eastport SS. Corp.* v. *United States, supra,* 372 F. 2d at 1008–1009.

Before such an entitlement exists, the claimant must be able to point to express congressional authority for the damage claim.

It is not sufficient for these purposes (or, indeed, even relevant to the ultimate determination) that the creation of a money damage remedy against the United States might be thought responsive to a particular conception of enlightened public policy (see A. Br. 9–11). The only issue is whether Congress, in express and unequivocal terms, has waived a portion of the traditional sovereign immunity of the United States by creating a substantive right to money damages in favor of the claimant. *E.g., Summers* v. *United States,* 510 F. 2d 123, 124–125 (C.A. 8); *Jackson* v. *Lynn, supra,* 506 F. 2d at 236–237; *Gnotta* v. *United States, supra,* 415 F. 2d at 1276–1278; see also *United States* v. *King, supra,* 395 U.S. at 4; *Soriano* v. *United States,* 352 U.S. 270, 276; *United States* v. *Shaw,* 309 U.S. 495, 500; *United States* v. *Michel,* 282 U.S. 656, 659; *Eastern Transportation Co.* v. *United States,* 272 U.S. 675, 686; *Price* v. *United States and Osage Indians,* 174 U.S. 373, 375–376.

2. The *amici's* efforts to avoid application of these settled principles to the present case lead them into a variety of areas wholly unrelated to the claim for money damages made here by respondents. Thus, the *amici* point (Br. 11) to *Kamen Soap Products Co., Inc.* v. *United States,* 110 F. Supp 430, 124 Ct. Cl. 519, in support of their assertion that the Tucker Act eliminates from this case any consideration of the sovereign immunity of the United States. But *Kamen*

concerned simply the power of the Court of Claims to issue, in connection with a suit concededly within its jurisdiction, a subpoena *duces tecum* against an officer or employee of the United States.

Equally beside the point is the *amici's* citation (Br. 11) of the *Regional Rail Reorganization Act Cases,* 419 U.S. 102, which involved the Just Compensation Clause of the Fifth Amendment. That constitutional provision long has been recognized as creating, of its own force, a cause of action under the Tucker Act. The reason for this is that the right to recover monetary compensation for a Fifth Amendment taking, even absent a specific statutory predicate, is both consistent with the language of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation") and required to give meaning to the provision. See *Jacobs* v. *United States,* 290 U.S. 13, 16; and see generally, Developments in the Law, *supra,* 70 Harv. L. Rev. at 876–879. The cases interpreting the Just Compensation Clause are thus closely tied to the language and purpose of that particular constitutional provision, and provide no support for the *amici's* assertion that the Tucker Act eliminates from this case any consideration of the sovereign immunity of the United States.

Neither is the *amici's* argument advanced by their insistence (Br. 8–9, 12–13 n. 14) that there is a fundamental distinction between "a substantive right" to money damages from the United States and "a waiver of sovereign immunity." There cannot be a substantive right to money damages from the United States

without a corresponding waiver of sovereign immunity. Cf. *The Western Maid*, 257 U.S. 419, 433. But that does not mean that substantive rights and waivers of sovereign immunity are always coterminous. Thus, for example, the defense of sovereign immunity may be unavailable to persons acting under color of federal law, but in a manner inconsistent with a specific constitutional prohibition or beyond their statutory powers. See, *e.g.*, *Malone* v. *Bowdoin*, 369 U.S. 643, 647; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n. 11, 701–702. But where the United States is the party defendant, Congress cannot be deemed to have engaged in the futility of creating a "substantive right" to money damages against the United States without concomitantly having waived the immunity of the United States to suit.[3] Indeed, the creation of such a right against the United States necessarily constitutes a waiver of sovereign immunity.

[3] The *amici's* reliance (Br. 20–21) upon cases in which the United States was not the defendant and in which the immunity of the United States was not directly at issue (*e.g.*, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388; *Harmon* v. *Brucker*, 355 U.S. 579; *Bell* v. *Hood*, 327 U.S. 678) is therefore misplaced. The underlying issue in those cases was not whether the United States had waived its immunity to particular types of claims but whether individual defendants, allegedly acting unconstitutionally or beyond their statutory powers, were entitled to the historic protection from suit accorded the sovereign.

The remaining authorities cited by the *amici* are similarly irrelevant to the immunity issue posed by respondents' claim for money damages against the United States. The passage from *United States* v. *Sherwood*, *supra*, 312 U.S. at 586–587

B. VIOLATION OF ANY STATUTE OR REGULATION GOVERNING FEDERAL EMPLOYMENT DOES NOT AUTOMATICALLY CREATE A CAUSE OF ACTION FOR MONEY DAMAGES AGAINST THE UNITED STATES

The *amici* contend (Br. 9) that "in the context of government employment, the general rule is that an implied cause of action [for money damages] does exist wherever an employee's rights, whether created by the Constitution, Act of Congress, or executive regulation, have been violated." The *amici* proceed from that premise to argue (Br. 26) that, since a money damage remedy exists for wrongful classifications in the absence of an express congressional denial of that remedy, the absence of "anything in the legislative history of the Classification Act of 1949 remotely suggesting that Congress intended in that Act to create rights without remedies * * * is fatal in light

(Tucker Act confers jurisdiction only over suits brought solely against the United States), quoted by the *amici* (Br. 12), states only that the Tucker Act confers upon the Court of Claims "[j]urisdiction to entertain suits against the United States to recover damages for breach of contract and certain other specified classes of claims * * *." That is a far cry, however, from a statement that sovereign immunity is irrelevant in determining whether a federal statute "embodies a command to the United States to pay the plaintiff some money, upon proof of conditions which he is said to meet" (*Eastport S.S. Corp.* v. *United States*, *supra*, 372 F. 2d at 1008).

The *amici* also cite (Br. 11–12) cases such as *United States* v. *King*, *supra* (Court of Claims held to lack jurisdiction to issue declaratory judgments), and *Blaze* v. *Moon*, 315 F. Supp. 495 (S.D. Tex.), affirmed, 440 F. 2d 1348 (C.A. 5) (Court of Claims held to lack jurisdiction to issue injunctions). But those cases do not contain any language supporting the *amici's* view that all one need do is plead or assert an entitlement to money damages and the Tucker Act automatically eliminates any consideration of sovereign immunity.

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of the well-settled principle that remedies will be presumed when rights are created and the long history of awards of back pay to government employees based upon an implied cause of action." See also A. Br. 21–26, R. Br. 14–15. Neither the premise nor the conclusion is correct.

1. Even in cases involving only claims against private parties, the violation of a federal statute does not automatically give rise to a cause of action for money damages. See, *e.g., Cort* v. *Ash,* No. 73–1908, decided June 17, 1975; *Wheeldin* v. *Wheeler,* 373 U.S. 647. As already noted (see discussion at pp. 6–8, *supra*), moreover, where the United States is the party defendant, and the claimant is not suing for money improperly exacted or retained, the basis of the federal claim—whether the Constitution, a statute or a regulation—does not create a cause of action for money damages unless "in itself" it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport SS. Corp.* v. *United States, supra,* 372 F. 2d at 1008, 1009; accord, authorities cited at pp. 6–8, *supra.* Respondents and the *amici* have failed to cite any authority or to articulate any policy reasons justifying the suspension of these legal principles in the context of suits seeking reclassification.

This is not a wrongful discharge case, and the extensive reliance both by respondents and the *amici* on cases involving wrongful discharges or suspensions is consequently misplaced. When a person has been legally appointed to a particular position, he is entitled to the privileges and emoluments of that position until he has been legally disqualified. Thus, this Court stated in *United States* v. *Wickersham,* 201 U.S. 390, 399–400:

> [T]he question is whether the employee during his wrongful suspension by a subordinate officer is entitled to the compensation provided by law. We see no reason in such an attitude of the case, where the wrongful suspension is clearly established, and the ability of the incumbent to discharge the duties of his office affirmatively found, for withholding from him the compensation given by law to an incumbent of the place. * * * Where an officer is wrongly suspended by one having no authority to make such an order, he ought to be, and is, entitled to the compensation provided by law during such suspension. * * *
>
> The case comes to this: The appellee, by his appointment, * * * was entitled to the privileges and emoluments of his position until he was legally disqualified by his own action or that of some duly authorized public authority.[4]

[4] The cases involving wrongful discharges or suspensions, upon which respondents and the *amici* rely (see R. Br. 16; A. Br. 17–18, 21, 23–24), include *United States* v. *Wickersham, supra; Jackson* v. *United States,* 428 F. 2d 844, 192 Ct. Cl. 765; *Piccone* v. *United States,* 407 F. 2d 866, 186 Ct. Cl. 752; *Glidden* v. *United States,* 185 Ct. Cl. 515; *Fletcher* v. *United States,* 392 F. 2d 266, 183 Ct. Cl. 1; *Greenway* v. *United States,* 175 Ct. Cl. 350, certiorari denied, 385 U.S. 881; *Shaw* v. *United States,* 357 F. 2d 949, 174 Ct. Cl. 899; *Greenway* v. *United States,* 163 Ct. Cl. 72; *Daub* v. *United States,* 292 F. 2d 895, 154 Ct. Cl. 434; *Starzec* v. *United States,* 145 Ct. Cl. 25; *Newman* v. *United States,* 143 Ct. Cl. 784; *Watson* v. *United States,* 162 F. Supp. 755, 142 Ct. Cl. 749; and *Simon* v. *United States,* 113 Ct. Cl. 182.

In the present case, however, the claim is not that the respondents have been denied the benefits of the position to which they were appointed but that they have been denied the benefits of positions to which they should have been but were not appointed. Although persons wrongfully discharged or suspended from positions with the federal government are entitled to continued enjoyment of the privileges and emoluments of office until lawfully excluded (see Back Pay Act of 1966, as amended, 5 U.S.C. 5596), the rule has long been that persons are not entitled to the benefits of a position until they have been duly appointed to that position. *E.g., United States* v. *McLean,* 95 U.S. 750; *Ganse* v. *United States,* 376 F. 2d 900, 180 Ct. Cl. 183; *Tierney* v. *United States,* 168 Ct. Cl. 77; *Donnelly* v. *United States,* 134 F. Supp. 635, 133 Ct. Cl. 120; *Amundson* v. *United States,* 120 F. Supp. 201, 128, Ct. Cl. 80; *Price* v. *United States,* 80 F. Supp. 542, 112 Ct. Cl. 198; *Borak* v. *United States,* 78 F. Supp. 123, 110 Ct. Cl. 236, certiorari denied, 335 U.S. 821; *Dvorkin* v. *United States,* 101 Ct. Cl. 296, certiorari denied, 323 U.S. 730. As noted in our opening brief, there is nothing in the Classification Act even remotely suggesting that Congress intended to alter this long-standing rule. Consequently, a person appointed to a grade GS–13 position—such as respondents—is entitled to the benefits of only that position, unless and until he is appointed to a position at a different grade level.

Respondents and the *amici* also rely heavily (R. Br. 14–18, A. Br. 23–24) upon two recent Court of

Claims' decisions, *Chambers* v. *United States,* 451 F. 2d 1045, 196 Ct. Cl. 186, and *Allison* v. *United States,* 451 F. 2d 1035, 196 Ct. Cl. 263, dealing with claims of racial discrimination arising in connection with decisions whether to employ (*Chambers*) or promote (*Allison*). But we noted in our opening brief, and the *amici* concede (Br. 3–5), that those cases are in certain respects distinguishable from the present case. Most importantly, in neither *Chambers* nor *Allison* did the Court of Claims hold that the Classification Act or the Back Pay Act waives the immunity of the United States to suits seeking money damages for wrongful civil service classifications.[5]

[5] For many of the reasons already noted, moreover, we believe that *Chambers* and *Allison* were wrongly decided: specifically, (1) there is nothing in the executive orders (Exec. Order 11246, 30 Fed. Reg. 12319 (1965); Exec. Order 11478, 34 Fed. Reg. 12985 (1969)) relied upon in *Chambers* and *Allison* that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" as a result of their violation (*Eastport S.S. Corp.* v. *United States, supra,* 372 F. 2d at 1009; see also authorities discussed at pp. 6–8, *supra*); (2) even if the executive orders fairly could be so interpreted, only Congress has the power to waive the immunity of the United States to suit (*e.g., United States* v. *U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 513; *United States* v. *Shaw, supra,* 309 U.S. at 500–502; *Munro* v. *United States,* 303 U.S. 36, 41; *Finn* v. *United States,* 123 U.S. 227, 232); (3) the plaintiffs in *Allison* did not present a claim for "presently due" money damages, a remand being necessary in that case to "create" an entitlement to reclassification enforceable by the court through an award of money damages; and (4) both *Chambers* and *Allison*—like *Pettit* v. *United States,* 488 F. 2d 1026, 196 Ct. Cl. 207, and the present case, which built upon the foundation laid in *Chambers* and *Allison*—were decided over vigorous dissents, represented a radical departure from

2. Our position is not, as the *amici* would have it (see Br. 9–10 and n. 11, 15, 18, 21, 24–26), that Congress left respondents without remedy for their allegedly wrongful civil service classifications. Instead, our position is that Congress has not made available to persons wrongfully classified the remedy of either retroactive reclassification or money damages.[6]

prior Court of Claims' decisions, and have been disregarded or questioned in similar cases decided by the Court of Claims since the filing of our brief on the merits in this case (see decisions reprinted in Appendix, *infra*).

The importance of the rulings in *Chambers* and *Allison* has substantially diminished since the passage of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. III) 2000e *et seq.* (effective March 24, 1972), which expressly provides for back pay in cases of racial discrimination in federal employment. See 42 U.S.C. 2000e–5(g); *Albemarle Paper Co.* v. *Moody*, No. 74–389, decided June 25, 1975.

[6] There is a fundamental distinction, which respondents and the *amici* ignore, between prospective reclassification, on the one hand, and retroactive reclassification and money damages, on the other. This Court's decision in *Edelman* v. *Jordan*, 415 U.S. 651, presents an illustration of this distinction. *Edelman* was a class action brought against various officials of the State of Illinois to recover, *inter alia*, retroactive benefits under federal-state programs of Aid to the Aged, Blind and Disabled which had been withheld from class members when the State failed to comply with federally-imposed timetables for the processing of applications. Although this Court did not disturb so much of the lower courts' orders requiring the named officials to comply in the future with federally-imposed processing requirements, it did reverse that portion of the court of appeals' decision that permitted the recovery of retroactive benefits from the State. In response to plaintiffs' argument that such payments amounted to "equitable restitution," this Court held that retroactive benefits are "in practical effect indistinguishable in many aspects

But this does not mean the Classification Act creates "rights without remedies" (A. Br. 26). The fallacy in the *amici's* assertion that acceptance of our position would leave respondents without redress for their allegedly wrongful classifications, and would render the Classification Act a mere "hortatory catalogue of high principles" (Br. 15), is revealed by their own discussion of the provisions of the Classification Act (Br. 13–15). Neither reason nor authority supports the proposition, implicit in the *amici's* "rights/remedies" argument, that redress in money damages must be implied for the failure to meet in individual cases the policy goals declared by Congress if those goals are to be met.[7]

from an award of damages against the State" (415 U.S. at 668) and that they were therefore barred by the sovereign immunity principles contained in the Eleventh Amendment.

The principles of sovereign immunity applied in *Edelman* are analogous in essential respects to those applicable to suits against the United States. See *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra;* 3 Davis, *Administrative Law Treatise*, Section 27.02, p. 548 n. 1 (1958 ed.).

[7] As we noted in our opening brief, respondents have filed a mandamus action in the United States District Court for the Eastern District of Pennsylvania, seeking an order directing the Civil Service Commission to reclassify their positions to grade GS–14. *Testan and Zarrilli* v. *Hampton, et al.* (Civil Action No. 71–2250). If respondents should decide to proceed with that action, the government will not contest the district court's jurisdiction to entertain respondents' claim for prospective equitable relief.

Regardless of the forum, however, respondents are not entitled either to back pay or retroactive reclassification. The unavailabil-

The sweeping and overbroad claims made by respondents and the *amici,* if accepted, would render superfluous the many federal statutes—such as the Back Pay Act—which expressly provide for a money damage remedy against the United States in carefully limited circumstances. There is no reason in policy, and respondents and the *amici* suggest none, which would justify the categorical disregard of the limitations Congress has placed upon payment out of the public treasury of the United States. More specifically, neither reason nor authority supports the contention that the Classification Act is unenforceable save through suits for retroactive back pay or that the administrative procedures provided for by Congress in the Classification Act will leave without sanction departures from the goal of "equal pay for substantially equal work" (5 U.S.C. 5101).

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ity of retroactive relief is confirmed by regulations issued by the Civil Service Commission (see 5 C.F.R. 511.701, 511.702) and by a series of decisions rendered by the Comptroller General of the United States holding that, in general, reclassifications may not be made retroactively effective in the absence of a statute expressly so providing but that they may become effective—for salary and other purposes—on the date on which the reclassification action is taken by the administrative official vested with proper authority or on some reasonable future date fixed by the administrative official. See, *e.g.*, 52 Comp. Gen. 631 (1973); 48 Comp. Gen. 502 (1969); 39 Comp. Gen. 583 (1960); 37 Comp. Gen. 492 (1958); 30 Comp. Gen. 156 (1950); 25 Comp. Gen. 604 (1946); see also *Dianish* v. *United States*, 183 Ct. Cl. 702, 718; 53 Comp. Gen. 216 (1973); 50 Comp. Gen. 581 (1971).

CONCLUSION

For the foregoing reasons, as well as the reasons stated in our opening brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX

In the United States Court of Claims

No. 86–74

REX L. APPLEGATE, ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

Before KASHIWA, *Judge*, Presiding, LARAMORE, *Senior Judge*, and BENNETT, *Judge*.

ORDER

This civilian pay case is before the court on cross-motions for summary judgment. Plaintiffs are employes of the United States Customs Service (formerly the Bureau of Customs, Department of the Treasury). Their employment at the Bureau of Customs began in the early Winter of 1971, when they were appointed as trainees at the GS–7 level. The Standard Form 50, "Notification of Personnel Action," received by each plaintiff at the time of appointment, contains the following language:

> "Trainee to journeyman promotion to GS–9 due [1 year from commencement of employment] providing all requirements are met."

Plaintiffs also received oral assurances of promotion similar to the above-written language.

On December 11, 1972, the President of the United States ordered a freeze on, *inter alia*, virtually all promotions of Federal civilian employees. The freeze was

lifted for Bureau of Customs employees on March 4, 1973, and plaintiffs were thereafter promoted to grade GS–9. The net result of the freeze was a delay of 2 to 3 months in the promotions anticipated for each plaintiff upon the completion of his first year of service. The relief sought is correction of records to show promotion to grade GS–9 at the end of 1 year of service and recovery of the difference in pay between the higher and lower grades during the period of delay.

Plaintiffs first argue as a basis for recovery that the assurances of promotion they received were promises, the acceptance of which created contracts between plaintiffs and the Government. It is contended that the freeze on promotions was a breach of those contracts. We reject this contention and reaffirm that employment (and the perquisites thereof) by appointment with the Government does not create a contractual relationship. *Hopkins* v. *United States,* 206 Ct. Cl. —— (March 1975); *Urbina* v. *United States,* 192 Ct. Cl. 875, 428 F. 2d 1280 (1970). Nor did plaintiffs otherwise have any "legal entitlement" to promotion at the end of 1 year of employment. Appointment and promotion of employees are, of course, discretionary matters within the agency. *Hirsch* v. *United States,* 205 Ct. Cl. 256, 499 F. 2d 1248 (1974); *Tierney* v. *United States,* 168 Ct. Cl. 77 (1965); *Amundson* v. *United States,* 128 Ct. Cl. 80, 120 F. Supp. 201 (1954). There is no statute or regulation which mandates promotion of plaintiffs under these circumstances. Furthermore, the very assurances of promotion given to plaintiffs were conditioned on "all requirements" being met. The availability of funds to pay the higher salaries of promoted employees is an assumed contingency to promotion and must be considered as a "requirement" within the meaning of the language of

plaintiffs' Standard Form 50's. *See, e.g., Allison* v. *United States,* 196 Ct. Cl. 263, 269, 451 F. 2d 1035, 1038 (1971).

Plaintiffs' second asserted basis for recovery is that the Office of Management and Budget's (OMB) refusal to exempt plaintiffs from the President's freeze order was arbitrary and capricious. Insofar as relevant here, the OMB had been empowered by the President to grant exceptions to the freeze "where essential" "to protect property" or "to preserve the continuity of government." Assuming, without deciding, that arbitrary and capricious action by the OMB would be the basis for an action in this court, we conclude that the OMB's action was neither arbitrary nor capricious. The OMB could reasonably conclude that plaintiffs' promotions were not essential to protect property or to preserve the continuity of government. In addition, the OMB's action was consistent with guidelines prepared by the Civil Service Commission, which guidelines did not recognize "career program, career ladder, or similar promotion patterns" to constitute valid exceptions to the freeze.

IT IS THEREFORE ORDERED, upon consideration of the arguments made by the parties both in briefs and orally, that plaintiffs' motion for summary judgment be and the same is hereby denied, and defendant's cross-motion for summary judgment is granted. Plaintiffs' petition is dismissed.

By the Court:

SHIRO KASHIWA,
Judge, Presiding.

JUNE 27, 1975.

BEST COPY AVAILABLE

In The United States Court of Claims

No. 264–73

GERALD J. ROSEMAN

v.

THE UNITED STATES

Before SKELTON, *Judge,* Presiding, KUNZIG and BENNETT, *Judges.*

ORDER

This military pay case comes before us on defendant's motion to dismiss plaintiff's petition for failure to state a claim upon which relief can be granted.

Plaintiff, a Major in the Air Force, brings this action under the Tucker Act, 28 U.S.C. § 1491, as amended (Supp. 1972), seeking a retroactive promotion to the rank of Lt. Colonel, effective April 22, 1974, with corresponding back pay and correction of his military records. Additionally, plaintiff seeks correction of his military records to reflect a previously granted promotion to the rank of Major, effective November 11, 1967.

Upon consideration of defendant's memorandum in support of its motion, plaintiff's memorandum in opposition and without oral argument, we conclude plaintiff has failed to state a claim within the jurisdiction of this court.

An absolute prerequisite to our jurisdiction is a claim for a money judgment presently due. *United States* v. *King,* 395 U.S. 1 (1969); *Kirby* v. *United States,* 201 Ct. Cl. 527, 537 (1973), *cert. denied,* 417

U.S. 919 (1974). While plaintiff has proposed a novel twist, his failure to present an independent monetary claim is fatal to his case. The only potential claim for a money judgment presented in plaintiff's petition is retroactive pay in the rank of Lt. Colonel. This back pay claim is contingent on our first ordering plaintiff's promotion in a case where the promotion is within the discretionary zone. We have held that this court is not in the promotion business. *Yee* v. *United States,* —— Ct. Cl. ——, 512 F. 2d 1383 (1975). But even if we were in the "promotion business," such relief could only be granted incidental to, and not independent of, a monetary judgment.

Since plaintiff has not presented an independent monetary claim upon which this court can grant relief, his request for correction of his military records must likewise be dismissed. Although Pub. L. 92–415 would permit this court to order the correction of military records incidental to the award of a money judgment, this statute does not provide an independent jurisdictional basis.

In his opposition to the present motion, plaintiff has asked us to transfer his case to a United States District Court under our 28 U.S.C. § 1506 transfer power in the event we find our jurisdiction wanting. We deny this request.

Our § 1506 transfer authority exists in situations where we find the claim presented to be in the exclusive jurisdiction of a United States District Court. Plaintiff's case, as pleaded, is not within the exclusive jurisdiction of the District Court. Plaintiff's petition names the United States as defendant. Under such caption, the District Court's jurisdiction, if any, would be concurrent with ours, under the Tucker Act, but not exclusive.

IT IS THEREFORE ORDERED defendant's motion to dismiss is granted and the petition is dismissed. Plaintiff's request for transfer under 28 U.S.C. § 1506 is denied.

By the Court:

BYRON SKELTON,
Judge, Presiding.

JUNE 27, 1975.

In the United States Court of Claims

No. 292–69

EMIL W. KAESERMAN

v.

THE UNITED STATES

Before NICHOLS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

ORDER

This case was originally briefed and argued before the full court on cross motions for summary judgment. By order dated June 1, 1973, the court with three judges dissenting, remanded the case to the Army Board for Correction of Military Records (ABCMR), 202 Ct. Cl. 1081. The suit is for commissioned officer's pay during a period of years when the plaintiff actually was employed as an enlisted man, having been rejected for return to active duty in the reserve officer rank he held. The circumstances included a 1947 diagnosis of plaintiff as suffering from herniated nucleus pulposus, which the Surgeon General in 1965 held was and had been erroneous. This diagnosis did not disqualify plaintiff from active duty as an enlisted man but for reasons not fully or at all explained, did disqualify him as an officer in a rank he had previously held. See the prior order for further details. The remand did not dispose of the motions, and such disposal is now possible. The

parties have filed supplemental briefs and argued the case orally before this panel. Since the oral argument plaintiff has filed a motion, which we have allowed, for leave to file another supplemental brief and such further brief has been considered.

The ABCMR took the case as directed and granted plaintiff a hearing. It obtained *ex parte* a further report from the Surgeon General. In light of that further report, it is not as clear as it previously appeared that the disqualification decisions of 1948 and later relating to plaintiff's physical fitness for active duty as an officer were in error. The ABCMR finds in effect they were correct. The plaintiff, taking the opposite side of the coin, also contended to the ABCMR that when retired he was disabled and should have received a disability retirement as a Colonel.

As we read the ABCMR, even if the medical evidence in the case were unchanged from when it was before us previously, it would be impossible because too speculative to postulate a constructive active duty credit as an officer for this plaintiff from 1948 to 1966. This is what we wanted the Board to determine. Though 3d Army apparently wanted plaintiff on active duty with it, the Board says there was little need to recall officers of his specialty in 1948 when he applied. We must presume this statement is based on fact and is not a fabrication. If there was a need in 1950, the Korean war period, it would be impossible to say how long plaintiff would have served or what rank he would have attained. There is no way we can say the Board was arbitrary and capricious in drawing this conclusion as to a matter within its expertise. Assuming the Board to be unwilling to exercise its discretion favorably in the premises, there is no way this court can constructively and retroactively order active duty

or promotions in rank. *Abruzzo* v. *United States,* 206 Ct. Cl. (No. 141–73, decided April 16, 1975). If the discretion were ours, how we would exercise it is not for consideration here.

The claim that plaintiff was disabled on retirement in 1966 was apparently an attempt to exploit plaintiff's repeated rejections on physical grounds as a kind of estoppel. Plaintiff applied for retirement on longevity grounds and a medical Board at that time found he was fit for further active duty. We do not think the ABCMR was arbitrary and capricious in denying a disability retirement, especially since plaintiff linked this claim, inextricably so far as the ABCMR decision reveals, with the contention he should have been retired as a Colonel. The rank at retirement and the character of retirement are logically two distinct issues, but if the applicant for relief links them together as one, the ABCMR is not arbitrary and capricious in doing the same.

We do not think the ABCMR committed any error reversible by us in obtaining *ex parte* a further medical report from the Surgeon General, for use in considering plaintiff's requests for discretionary relief. *Merson* v. *United States,* 173 Ct. Cl. 92, 97–98 (1965).

The 1973 order in this case anticipated *Testan* v. *United States,* 205 Ct. Cl. 330, 499 F. 2d 690 (1974), *cert. granted,* 420 U.S. 923 (1975), in holding that under authority of Pub. L. 92–415 amending 28 U.S.C. § 1491, we could remand a case to an administrative body for consideration or reconsideration of relief we could not ourselves directly grant because essentially discretionary, when a favorable decision below would generate a valid money claim. Pending the outcome of *Testan,* in the Supreme Court, this order is not to be read as affirming or disaffirming our belief in the existence of such power.

In view of the foregoing, plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and the petition is dismissed.

By the Court:

PHILIP NICHOLS, JR.,
Judge, Presiding.

KUNZIG, *Judge,* concurs in the result.

JUNE 27, 1975.

In the United States Court of Claims

No. 432–74

JAMES E. BARNUM

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* DAVIS and KASHIWA, *Judges.*

ORDER

This case comes before the court on defendant's motion to dismiss plaintiff's petition. Plaintiff, an Army officer on active duty in Taiwan, seeks a retroactive promotion from the rank of Major to Lieutenant Colonel or, alternatively, for an order directing that he be placed before an Army Standby Advisory Board to be considered for promotion. He also seeks retroactive pay and allowances if the promotion is granted, requests that a challenged efficiency report be expunged from his records, and asks the court to render a declaratory judgment that certain regulations relating to the Army Board for the Correction of Military Records are unconstitutional. Upon consideration of defendant's motion and plaintiff's objection thereto, the court finds:

(1) Plaintiff challenges an efficiency report rendered for service during the period October 9, 1967 to June 26, 1968, on the ground that the reporting system used at the time the efficiency report was rendered was subject to a general inflation in the case of some officers and that the report rendered as to

plaintiff under the new system unduly penalized an officer such as plaintiff, whose rater and endorser made a conscientious effort to deflate the rating system in response to guidance from headquarters.

(2) In an effort to have the challenged efficiency report removed from his records and to obtain promotion, plaintiff has appealed to the Army Special Review Board, Office of the Adjutant General, and to the Army Board for the Correction of Military Records.

(3) The Army Special Review Board found that the evidence submitted by plaintiff was not sufficient to justify withdrawal or alteration of the efficiency report, and the Army Board for the Correction of Military Records denied his application.

(4) For the purpose of defendant's motion, plaintiff's allegations regarding the circumstances under which the challenged efficiency rating was made, are accepted as true. However, such circumstances did not invalidate the discretionary authority of Army officials to deny plaintiff's promotion.

Having decided that defendant's motion to dismiss should be treated as a motion for summary judgment in order to consider the documentary evidence offered by plaintiff, the court concludes as follows:

(A) The retroactive promotion of plaintiff with back pay would involve an intrusion into the discretionary military promotion processes which is not justified in this case where plaintiff does not have a clear legal entitlement to the pay of a higher rank. *Doggett* v. *United States,* No. 459–73 (Ct. Cl., decided July 11, 1975); *Cooper* v. *United States,* 203 Ct. Cl. 300 (1973); *Abruzzo* v. *United States,* 206 Ct. Cl. — (1975).

(B) Since the court is not authorized to grant plaintiff monetary relief in this case, his request for an order to have the challenged efficiency report removed from his record and for a judgment declaring the regulations unconstitutional must be denied on the ground that these claims are outside the court's jurisdiction. *See Austin* v. *United States,* No. 5–74 (Ct. Cl., decided April 16, 1975) and *Jankovic* v. *United States,* 204 Ct. Cl. 807 (1974). This holding is also applicable to plaintiff's request for an order that he be placed before the Army Standby Advisory Board for purposes of early promotion.

It is therefore ordered that defendant's motion for summary judgment is granted and plaintiff's petition is hereby dismissed.

By the Court:

NELSON COWEN,
Chief Judge.

AUGUST 1, 1975.

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No. 74-753

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, *Petitioner*

v.

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR MELVIN ALLISON, ET AL., AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-753

UNITED STATES OF AMERICA, *Petitioner*

v.

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR MELVIN ALLISON, ET AL., AS AMICI CURIAE

STATEMENT OF INTEREST OF AMICI CURIAE

This brief of amici curiae is filed with the written consent of the petitioner and the respondents. The letters of consent have been filed with the Clerk of the Court.

Amici are the plaintiffs in *Allison* v. *United States,* 196 Ct. Cl. 263, 451 F.2d 1035 (1971). Their suit in the Court of Claims is based upon the racially discriminatory employment practices of the Grounds Maintenance and Landscaping Unit of the National Institutes of Health, Department of Health, Education and Welfare ("HEW"), where all of the amici were employed at the time the complaint was filed.

Amici filed their complaint in the Court of Claims after an extensive administrative proceeding in which it was found that racial discrimination existed in the promotion practices of the Grounds Maintenance and Landscaping Unit. Amici's claim for back pay was based upon Executive Order No. 11246, 30 Fed. Reg. 12319 (1965),[1] certain HEW regulations, the Back Pay Act, 5 U.S.C. § 5596 (1970), and the Constitution of the United States.

On cross-motions for summary judgment, the Court of Claims ruled that it had jurisdiction over amici's claim. The Court concluded that the Executive Order "provide[s] authority for awarding back pay," 196 Ct. Cl. at 265, 451 F.2d at 1036. This conclusion was based upon the Court of Claims' decision in another government employee racial discrimination case, *Chambers* v. *United States,* 196 Ct. Cl. 186, 451 F.2d 1045 (1971), which was decided the same day as *Allison.* The *Chambers* opinion contains an extensive review and analysis of the decisions of this Court and of the Court of Claims with respect to the jurisdiction of the Court of Claims.[2]

The Court of Claims has not to date awarded amici back pay, since it found in 1971 that the administrative record was inadequate for purposes of determining which of the amici would have been promoted in the absence of racial discrimination, and the amount

[1] Executive Order No. 11246 is now superseded in relevant part by Executive Order No. 11478, 34 Fed. Reg. 12985 (1969), as amended by Executive Order No. 11590, 36 Fed. Reg. 7831 (1971).

[2] The Court of Claims has since reaffirmed its decisions in *Allison* and *Chambers. See* Pettit v. United States, 488 F.2d 1026, 203 Ct. Cl. 207 (1973); Small v. United States, 470 F.2d 1020, 200 Ct. Cl. 11 (1972).

of back pay owed amici. 196 Ct. Cl. at 269, 451 F.2d at 1038. It therefore suspended proceedings

> "to allow plaintiffs to apply for administrative findings which shall show, person by person, whether such person would have been promoted, when, and to what grade or grades, in light of such person's qualifications, the qualifications of competitors, the existence of vacancies, the availability of funds, and all other factors that would have properly influenced the exercise of discretion in the making of an actual promotion at the time a promotion was due." 196 Ct. Cl. at 271, 451 F.2d at 1039.

The proceedings remained suspended until May 22, 1975.[3] Amici presently have a motion pending before the Court of Claims seeking an order directing HEW to (1) produce documents relevant to the issue of damages, (2) conduct a hearing concerning the amount of back pay owed amici, and (3) make necessary findings concerning the amount of back pay due each amicus. In response to amici's motion, HEW has asked for a dismissal or, in the alternative, a stay of proceedings based, in part, on the contention that this Court's decision in *Testan* v. *United States,* 499 F.2d 690, Ct. Cl. No. 128-72 (1974) with respect to the Court of Claims' jurisdiction would be dispositive of *Allison.*[4]

This Court's decision in the present case, however, would be dispositive of *Allison* only if the Court here

[3] Despite numerous requests by amici, administrative proceedings have still not been held at this late date. The period from the Court of Claims' Order in 1971 to date has been occupied almost entirely with settlement negotiations, which were initiated at the request of HEW.

[4] HEW raised the same argument in an earlier motion, but the trial judge of the Court of Claims disposed of the motion on grounds that made consideration of the argument unnecessary.

affirms the action of the Court of Claims since affirmance of *Allison* would be *a fortiori*. But if this case is decided in petitioner's favor, the decision here would not be dispositive of the issue of the jurisdiction of the Court of Claims in *Allison*. The claim for back pay in *Allison* is based upon Civil Rights Executive Orders, the Constitution, and the Back Pay Act, not the Classification Act of 1949. Further, the plaintiffs in *Allison* are black federal employees whose substantive right to be free from racial discrimination practiced by the government has been contravened. As such, constitutional issues and important federal policy issues, not applicable to or properly raised by this case, would bear upon any consideration of jurisdiction of the Court of Claims to award back pay in *Allison*. In fact, the government has conceded that the jurisdictional issue raised by *Allison* is "readily distinguishable" from the jurisdictional issue presently before this Court. Pet. Br. p. 22.[5]

It is the concern of amici that petitioner is making in this case far-reaching arguments which, if accepted, could severely impede the efforts of plaintiffs in *Allison* and other government employees to vindicate their legal rights, including their right to be free from racial discrimination. Plaintiffs in *Allison* and many other government employees would be severely handicapped in securing redress if the Court were to decide, as petitioner urges, that back pay for previous government employment can be awarded only where a federal statute expressly so provides, or that the sovereign immunity of the United States insulates the government from a suit for damages for wrongful employment practices. Amici show in the following that petitioner

[5] *See also* Petition for a Writ of Certiorari, p. 10 n.8, distinguishing the basis for jurisdiction in *Allison* from the instant case.

errs in these arguments and that respondents in this case have stated a valid cause of action within the jurisdiction of the Court of Claims. If the Court decides, however, that the Court of Claims erred in this case, amici urge that the decision be carefully confined to the particular statute on which the claim in this case is based. In particular, a decision of this Court bearing upon the authority of the Court of Claims to award back pay for contravention of Civil Rights Executive Orders or other statutes should be reserved for a case in which the issue is properly raised and the extensive constitutional, statutory, and policy issues are fully briefed and argued. Obviously this is not that case.

Nevertheless, because of its importance to a large number of government employees who could potentially lose the principal judicial forum available to them for the vindication of their employment rights, amici will address the jurisdictional issue raised by this case:

> Whether respondents' claims for back pay based upon an alleged misclassification of their Civil Service employment position states a cause of action for back pay over which the Court of Claims has jurisdiction under the Tucker Act.

Amici will not address the second issue raised by petitioner.[6]

SUMMARY OF ARGUMENT

The Court of Claims properly concluded that it had jurisdiction to entertain respondents' claim. That

[6] "Whether, in determining the correctness of respondents' classifications, the Classification Act requires that the positions held by respondents be compared with those of employees in another agency." Pet. Br. p. 2.

claim stated a valid cause of action under the Classification Act of 1949 which guarantees to all federal employees "equal pay for equal work." Where that mandate has been breached, as respondents allege, the Court of Claims has jurisdiction to compel the United States to compensate employees who have been financially aggrieved by that violation since: (1) the Court of Claims' power to award back pay for injuries resulting from government employment practices has been recognized in numerous cases, (2) that remedy is a generally accepted and important form of redress for unlawful employment practices, (3) determinations of the existence and amount of governmental liability under the Classification Act of 1949 are squarely within the competence of the Court of Claims, (4) Court of Claims jurisdiction over violations of the Classification Act of 1949 is necessary to assure an effective remedy for unlawful government employment practices, (5) ousting the Court of Claims of jurisdiction would be contrary to fair and sound federal employment practices and fosters no legitimate governmental employment or other interest.

The failure of the Classification Act of 1949 expressly to authorize suits in the Court of Claims for damages or to waive the sovereign immunity of the United States does not bar Court of Claims jurisdiction. Applicable authorities recognize a right to damages for unlawful employment practices not withstanding the failure of relevant statutes to particularize the kinds of remedies which will be available to enforce the statutory rights. It is equally settled that the Tucker Act constitutes a waiver of sovereign immunity for damages resulting from violations of federal statutory requirements, whether or not the applicable statute itself explicitly waives sovereign immunity.

ARGUMENT

RESPONDENTS' CLAIM FOR BACK PAY BASED UPON THE ALLEGED DENIAL OF THEIR RIGHTS UNDER THE CLASSIFICATION ACT STATED A CAUSE OF ACTION OVER WHICH THE COURT OF CLAIMS HAD JURISDICTION UNDER THE TUCKER ACT.

Respondents' suit in the Court of Claims was based upon an alleged misclassification of their employment positions in violation of the Classification Act of 1949.[7] For that, they sought back pay and reclassification of their positions from GS-13 to GS-14.

The basic issues in the present case, so far as Court of Claims jurisdiction[8] is concerned, are: (1) whether an alleged misclassification of respondents' employment positions creates a "claim against the United States founded . . . upon . . . any Act of Congress" within the meaning of the Tucker Act, 28 U.S.C. § 1491 (1970); and (2) whether the grant of jurisdiction in the Court of Claims over claims founded *inter alia* upon "any Act of Congress" constitutes a waiver of sovereign immunity with respect to such claims. If the answers are affirmative, respondents may properly maintain a suit in the Court of Claims to recover back pay for the period of the alleged wrongful Civil Service classifications of their employment positions.[9]

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[7] The Classification Act of 1949, 5 U.S.C. § 5101, *et seq.* (1970), repealed the Classification Act of 1923, Pub. L. No. 67-516, 42 Stat. 1488.

[8] The Court of Claims ruled that it did not have the authority to reclassify respondents' positions. Pet. App. p. 39. Respondents are not here contesting the propriety of that ruling.

[9] Respondents' ultimate success is dependent on proof that their positions were improperly classified. Resolution of that issue is in turn dependent in part on the resolution of the legal issue raised

In undertaking to defeat that right, petitioner advances an amalgam of undisputed general principles and conclusory assertions that find no support in the decisions of either this Court or the Court of Claims. The principal shortcoming in petitioner's argument is its repeated confusion of two quite distinct matters, *i.e.*, the substantive rights of government employees on the one hand and the sovereign immunity doctrine on the other. Thus, petitioner's principal point in support of its argument that the improper classification of respondents' employment positions does not give rise to a "claim founded . . . upon . . . any Act of Congress" is that the applicable statute, the Classification Act of 1949, "does not contain any express provision or provisions waiving the sovereign immunity of the United States to suits seeking back pay for the allegedly improper classification of federal civil service positions." Pet. Br. p. 4. Petitioner thus concludes that since "consent to suit by the United States must be express and unequivocal and may not be found by implication" (*id.* at 16) and since "the Tucker Act does not create any substantive right, enforceable against the United States" (*id.* at 12), the United States has not waived its sovereign immunity, and the Court of Claims therefore was without jurisdiction to entertain respondents' suit.

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by petitioner—whether on the facts of the present case the Classification Act of 1949 requires a comparison of the position held by respondents in the Defense Personnel Support Center of the Defense Supply Agency with similar positions in the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command. That issue does not bear upon the questions of whether the United States has waived sovereign immunity or whether a cause of action lies for violation of respondents' rights under the Classification Act.

It is the confusion of these two very different issues —whether there has been a waiver of sovereign immunity and whether a substantive right has been created—that led to petitioner's erroneous conclusion that the waiver and the source of the right must be embodied in a single Act of Congress.[10]

When these two issues are disentangled and analyzed separately, it becomes apparent that petitioner's conclusion is in direct conflict with the decision of this Court and of the Court of Claims. As demonstrated below, the Tucker Act itself constitutes a consent to suit on claims for money damages based upon Acts of Congress. See pp. 11-12, *infra*. Moreover, as also demonstrated below, an implied cause of action may exist for the violation of a statutorily created right even though the statute on which the right is based does not by its express terms so state. Indeed, in the context of government employment, the general rule is that an implied cause of action does exist wherever an employee's rights, whether created by the Constitution, Act of Congress, or executive regulation, have been violated. See pp. 15-21. *infra.*

Apart from the failings of its narrow and erroneous legal arguments, petitioner's brief is also seriously flawed by its failure to articulate any policy or other basis for denying respondents access to the only forum available where they can effectively redress their grie-

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[10] "The Court of Claims . . . held by implication that the Classification Act creates a substantive right to back pay for wrongful classifications. We submit that that holding was in error. There is no provision of the Classification Act expressly waiving the sovereign immunity of the United States to suits seeking back pay for the period of wrongful civil service classification and, under prevailing law, it is clear that such a waiver may not be found by implication." Pet. Br. p. 9.

vance.[11] It does not urge that the Court of Claims lacks competency to consider the misclassification claim raised by respondents;[12] it does not explain *why* a remedy for one form of employment discrimination—improper classification—should be denied while remedies for other forms of illegal employment practices are routinely afforded.[13] It fails to identify any respect

[11] Respondents may be able to obtain a reclassification of their position for the future through the suit they have filed in the United States District Court for the Eastern District of Pennsylvania. Testan and Zarrilli v. Hampton, C.A. No. 71-2250. See Pet. Br. p. 18 n.10.

This reclassification would not, of course, compensate respondents for the injury in the form of lost pay and benefits that they have already suffered as a result of the alleged wrongful classification. Nor could the District Court award respondents back pay if this Court determines that the Court of Claims does not have jurisdiction under the Tucker Act over this type of claim because jurisdiction in the District Courts under the Tucker Act is concurrent with that of the Court of Claims. 28 U.S.C. § 1346. In fact, district court jurisdiction is more limited since a district court may not entertain claims against the United States that are for an amount greater than $10,000. *Ibid.*

[12] Even if such argument had been made it would have to be rejected in view of the Court of Claims' plenitude of experience in dealing with issues far more intricate and complex than those raised by respondents' claim (*see* Glidden v. Zadanok, 307 U.S. 530, 536-37 (1962)), and the Court of Claims' authority under the Remand Statute ((28 U.S.C. § 1491) (Supp. III), Pub. L. 92-415, 86 Stat. 652 (1972)) to obtain the benefit of administrative expertise if it deems such assistance necessary.

[13] Amici refer in the following to many decisions of this Court and of the Court of Claims awarding back pay to government employees for various violations of employment rights arising under the Back Pay Act, the Equal Employment Opportunity Act of 1972, and many other federal statutes. Furthermore, back pay is routinely awarded in a variety of other contexts including cases of racial discrimination on the part of a private employer (*see, e.g.*, United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973)); for violations of the National Labor Relations Act

in which Court of Claims jurisdiction would be inimical to sound government employment policies, or any other governmental policy; it does not suggest any way that a decision favorable to respondents in this case would open the flood gates to unwarranted Court of Claims jurisdiction in other categories of cases.

In short, petitioner has clearly identified the limits on Court of Claims jurisdiction which it advocates; but petitioner has been unable to spell out any justification for the adoption of those limits.

A. The Tucker Act Constitutes a Waiver of Sovereign Immunity for Claims Against the Government Founded on Federal Statutes.

It is settled in decisions of this Court and lower courts that the Tucker Act constitutes a waiver of sovereign immunity, with respect to claims for damages founded upon *inter alia* Acts of Congress:

> "The sovereign immunity of the Government from suit was waived in the very acts of Congress establishing this court and conferring upon its jurisdiction to determine claims against the Government." *Kamen Soap Products Co., Inc.* v. *United States,* 124 Ct. Cl. 519, 526, 110 F. Supp. 430, 433 (1953).

See, e.g., Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974); *United States* v. *King,* 395 U.S. 1, 3-4 (1969); *Glidden Co.* v. *Zadanok,* 370 U.S. 530, 557-

(*see, e.g.*, J. P. Stevens & Co. v. NLRB, 417 F.2d 533 (5th Cir. 1969)); for violations of the Railway Labor Act (*see, e.g.*, Dieringer v. Chicago, Milwaukee, St. Paul and Pacific R.R., 278 F. Supp. 211 (E.D. Wis. 1968)); and violations of the Universal Military Training & Service Act (*see, e.g.*, Hatton v. Tabard Press Corp., 406 F.2d 593 (2d Cir. 1969)).

58 (1962); *United States* v. *Sherwood,* 312 U.S. 584, 586-87 (1941); *United States* v. *Shaw,* 309 U.S. 495, 501 (1950); *Blaze* v. *Moon,* 315 F. Supp. 495, 497 (S.D. Tex. 1970), *aff'd,* 440 F.2d 1348 (5th Cir. 1971); C. Wright, *Law of Federal Courts* 70 (2d ed. 1970); Developments, *Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 975 (1970).

Indeed, in *United States* v. *Sherwood, supra,* this Court, after noting that "the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit," which was quoted by petitioner in its brief (Pet. Br. p. 14), went on to state in the very next sentence that:

> "Jurisdiction to entertain suits against the United States to recover damages for breach of contract and certain other specified classes of claims was conferred on the Court of Claims by Act of February 24, 1855, 10 Stat. 612. With additions not now material, the jurisdiction was continued by paragraph First of the Tucker Act of March 3, 1887, 24 Stat. at L. 505, Chap. 359, which, as supplemented and reenacted, is now § 145 of the Judicial Code, 28 U.S.C.A. § 250." 312 U.S. at 587.

It is impossible to reconcile those authorities with any theory that the Tucker Act does not constitute a waiver of sovereign immunity with respect to the claim asserted by respondents.[14]

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[14] Petitioner's argument based on the absence of an express sovereign immunity waiver in the Classification Act of 1949 was prompted by confusion of the two separate issues of the substantive statutory rights of government employees and whether the government has waived sovereign immunity with respect to the claim asserted. The only statute pertinent here to the issue of waiver of the sovereign immunity of the United States is the Tucker Act. And, as demonstrated above, there can be no doubt that the Tucker Act is an express and unequivocal waiver of sovereign immunity with respect to "any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. . . ." Whether the Classification Act of 1949 constitutes a waiver of sovereign immunity with respect to the claim asserted here is of no moment; the Tucker Act does constitute such a waiver. A requirement that the Classification Act of 1949 also contain an express waiver would, therefore, constitute an exercise in redundancy.

B. Respondents Have a Valid Cause of Action for Back Pay Under the Classification Act of 1949.

The question of whether federal civil service employees have a right to back pay for the period that their employment positions have been improperly classified has two components: (1) does the Classification Act of 1949 create a right in federal employees to have their positions properly classified; and (2) does a violation of that right give rise to a claim for damages? *See Eastport Steamship Corp.* v. *United States,* 178 Ct. Cl. 599, 605-07, 372 F.2d 1002, 1007-09 (1967).

1. The first question is disposed of by a brief review of the Classification Act of 1949 and its legislative history. The starting point is section 101 of the Act, as amended, which provides:

> "It is the purpose of this chapter to provide a plan for classification of positions whereby—
>
> (1) in determining the rate of basic pay which an employee will receive—
>
> (A) the principle of equal pay for substantially equal work *will be supplied*; and
>
> (B) variations in rates of basic pay paid to different employees *will be in proportion* to substantial difference in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions

of employees to efficiency and economy in the services . . . ." 5 U.S.C. § 5101 (1970) (emphasis supplied).

The mandatory language used in this purposes provision as well as section 302 of the Act and the elaborate statutory procedure created by the Act for effectuating these purposes, including the grant of enforcement authority to the Civil Service Commission, makes it clear that the congressional statement that "the principle of equal pay for substantially equal work will be followed" is a statement of mandatory federal policy and is not merely precatory.

The mandatory nature of the purposes set forth in section 101 of the Act is made clear by section 302, which requires that each position be classified in accordance with the duties and responsibilities of the position and the qualifications required for the position. 5 U.S.C. § 5106. This command is to be carried out through the joint efforts of the Civil Service Commission and the various agencies. The Civil Service Commission, "after consulting the agencies," is required to establish standards for the placement of positions "in their proper classes and grades." 5 U.S.C. § 5105. Section 502 of the Act requires that agencies place each position under their jurisdiction in the appropriate class and grade in accordance with the standards published by the Civil Service Commission. *Id.* at § 5107. Report of the House Committee on Post Office and Civil Service to accompany H.R. 5931, H.R. Rep. No. 1264, 81st Cong., 1st Sess. 9 (1949) ("*Report*");[15] Hearings on S.558, S.1762, S.1772, S.1790 Before the

[15] H.R. 5931 was ultimately enacted into law as the Classification Act of 1949.

Subcommittee of the Committee on Post Office and Civil Service, 81st Cong., 1st Sess. 40 ("*Hearings*").[16] Those classifications then become the basis for the agencies' "pay and personnel transactions." 5 U.S.C. § 5107.

The Act grants the Civil Service Commission broad enforcement authority, including the power to suspend an agency's authority to classify its own positions, if the Commission "finds that an agency is not placing positions in classes and grades in conformance with or consistently with published standards. . . ." 5 U.S.C. § 5111. The Commission also has authority to reclassify specific positions if it finds that they have been improperly classified by the agency. 5 U.S.C. §§ 5110, 5112. The exercise of this classification authority is not discretionary; if the Commission finds that a position has been improperly classified, it is required to reclassify it. *Ibid.* Moreover, the enforcement powers of the Commission may be brought into play at the request of an agency employee. *Report* at 9. And the classifications made by the agency are binding on the affected agency for all personnel functions, including pay. 5 U.S.C. §§ 5110, 5112; *Report* at 9, *Hearings* at 40.

This review of the Classification Act of 1949 makes it clear that the Act is not merely a hortatory catalogue of high principles. It places an obligation on the government, along with a correlative right in government employees, to classify employment positions in a manner so that government employees will receive the same pay for like work.

2. Whether respondents have a cause of action for back pay for the alleged violation of their rights under

[16] The cited passage refers to § 502 of S. 1762, which was identical in all relevant parts to H.R. 5931.

the Classification Act of 1949[17] is dependent on whether that Act "can fairly be interpreted as mandating compensation by the federal government for the damages sustained" by respondents. *Eastport Steamship Corp.* v. *United States, supra,* 178 Ct. Cl. at 607, 372 F.2d at 1009.[18]

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[17] The Court of Claims expressly declined to consider the applicability of the Back Pay Act since it determined that respondents had stated a cause of action based upon the Classification Act of 1949. The Back Pay Act authorizes "back pay for a government employee who has undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, . . . the employee would have otherwise received." 5 U.S.C. § 5596 (1970). Notwithstanding petitioner's assertion that wrongful classifications, as distinct from other forms of unlawful employment practices, do not fall within the scope of the Back Pay Act (Pet. Br. p. 16), it is submitted that a wrongful classification is an "unjustified or unwarranted personnel action" within the meaning of the Back Pay Act. The meaning of the phrase "unjustified or unwarranted personnel action" was intentionally left open by Congress. H.R. Rep. No. 32, 89th Cong., 1st Sess. (1966); S. Rep. No. 1062, 89th Cong., 2nd Sess. (1966). The regulations of the Civil Service Commission implementing the Act continue this approach. Thus, while various examples of the "unwarranted and unjustified personnel actions" are listed in 5 C.F.R. §§ 550.803(e) (1974), the regulation explicitly states that such examples are not exclusive and are not intended to provide a complete catalogue of unwarranted personnel actions. Further, in the ordinary usage of the words, there is unwarranted or unjustified actions when an agency's practices do not conform with applicable law or regulations. And, Congress has long recognized that failure or omissions to act constitute "action." *See, e.g.* 5 U.S.C. § 551 (1970). Finally, the decisions of the Court of Claims dealing with the Back Pay Act support the conclusion that a wrongful classification is an unwarranted and unjustified personnel action within the meaning of the Back Pay Act. *See, e.g., Ainsworth* v. *United States,* 185 Ct. Cl. 110, 118, 399 F.2d 176, 181 (1968), and the cases cited therein.

[18] The Court of Claims there held that the alleged violation of the Shipping Act of 1916, which was at issue in *Eastport,* did not give rise to a cause of action for damages. The plaintiff had alleged that the wrongful refusal of the Maritime Commission to give the permission required by the Shipping Act of 1916 before the sale of a ship to a foreign buyer could take place, had caused it monetary damage as a result of a lost sale, and it sought to recover an amount equal to the alleged damage. The Court of Claims' holding that the plaintiff did not have a cause of action under the Shipping Act of 1916 was based primarily upon the "regulatory" nature of the provision sued upon. The Court concluded that, in light of the regulatory nature of that provision and the historical reluctance of the courts and Congress to provide a remedy to private parties for injuries suffered as the result of "erroneous or wrongful regulation," the Shipping Act of 1916 could not be fairly interpreted to provide the plaintiff with a cause of action. *Id.* at 1008-11. This conclusion was also based on the broad implications of finding an implied cause of action for violation of the Shipping Act of 1916 since the court found that the regulatory function it created was indistinguishable from a broad range of other regulatory roles played by the government. None of these considerations exists in the present case. As the Court of Claims recognized in *Eastport,* the courts have long provided a forum for government employees who have suffered a wrongful personnel action. *Id.* at 1008.

The cause of action may be expressly created or it may be created by implication. Contrary to petitioner's suggestion that an express statutory declaration is a precondition to suit in the Court of Claims,[19] it has long been settled by decisions of this Court and the Court of Claims that claims for back pay may be asserted in the Court of Claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department . . ." based upon an implied cause of action. *United States* v. *Wickersham,*

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[19] "But no amount of analysis of [the Classification Act], viewed as a whole or section-by-section, can avoid the conclusion that Congress made no provision in the Classification Act for the award of back pay to persons found, whether administratively or by judicial decision, to have been erroneously classified." Pet. Br. p. 15. No decisions are cited by petitioner in support of this position. Nor does petitioner present any general principles or policy reasons to support its position.

201 U.S. 390 (1906); *accord, Simon* v. *United States,* 113 Ct. Cl. 182 (1949); *Greenway* v. *United States,* 163 Ct. Cl. 72 (1963); *Daub* v. *United States* 154 Ct. Cl. 434 (1961); *Betts* v. *United States,* 145 Ct. Cl. 530 (1959); *Ruffin* v. *United States,* 144 Ct. Cl. 689 (1959); *Newman* v. *United States,* 143 Ct. Cl. 784 (1958); *Watson* v. *United States,* 142 Ct. Cl. 749 (1958). *See also Keef* v. *United States,* 185 Ct. Cl. 454 (1968); *Starzck* v. *United States,* 145 Ct. Cl. 25 (1959); *cf. Burton* v. *United States,* 404 F.2d 365 (Ct. Cl. 1968), *cert. denied,* 394 U.S. 1002 (1969).

Were the rule otherwise, the jurisdiction of the Court of Claims, particularly with respect to claims founded upon violations of the Constitution, would be extremely circumscribed so as to insulate the United States from suits seeking vindication of a wide range of constitutional, statutory, and other substantive and procedural rights. Indeed, if an express provision of a cause of action were required, the inclusion in the Tucker Act of claims founded upon the Constitution would be hollow indeed, except perhaps for claims founded upon the Fifth Amendment prohibition on the taking of private property without just compensation, since the Constitution does not explicitly state that citizens have a cause of action for violations by the federal government of their constitutionally protected rights.

The leading decision in this area is *United States* v. *Wickersham, supra.* The plaintiff there was an employee who had been improperly suspended from a position within the Department of the Interior, which had been established by orders of the President and Secretary of the Interior pursuant to a civil service statute. No provision of the statute or of the executive

orders provided for compensation or back pay to employees unlawfully denied their positions or for a cause of action based upon an unlawful denial of their positions. On appeal by the United States, this Court affirmed the Court of Claims' ruling that the plaintiff was entitled to recover back pay, and stated in terms appropos to respondents' claims:

> "Whether [plaintiff] could have been summarily removed or suspended by the President or other competent authority is not the question now before the court, but the question is whether the employé during his wrongful suspension by a subordinate officer is entitled to the compensation provided by law. We see no reason in such an attitude of the case, where the wrongful suspension is clearly established, and the ability of the incumbent to discharge the duties of his office affirmatively found, for withholding from him the compensation given by law to an incumbent of the place. If this be not so, then a regular and duly qualified employé in the public service, protected by the statute and the orders of the President made in pursuance thereof, can be deprived of the benefit and emolument of his position by a wrongful and illegal suspension from his duties. We do not think such a contention can be sustained either by reason or authority." 201 U.S. at 399.

Similarly, respondents should not be denied the right to sue in the Court of Claims to recover the benefits of the GS-14 positions to which they claim entitlement. If the duties and responsibilities of respondents' positions are such that they are entitled by statute to have their positions classified as GS-14, neither policy considerations nor legal authority suggest that they should be denied back pay for the period of their incumbency while those positions were improperly classified.

The Court of Claims has regularly applied the *Wickersham* rule in a variety of cases where an express statutory authorization of an award of back pay has been absent. See the cases cited at page 18, *supra*. Illustrative is *Simon* v. *United States, supra*. There the government, while conceding that its treatment of the plaintiff violated applicable personnel regulations, asserted that the regulations did not expressly provide any cause of action for relief in the Court of Claims. Rejecting this argument, the Court of Claims held that the admitted violation of the regulations gave rise to a claim for money damages within its Tucker Act jurisdiction:

> "It is not necessary, to the jurisdiction of the court to render a money judgment upon rights conferred, that the statute, contract, or regulation upon which the claim is founded contain a provision that denial of a legal right thereunder shall give rise to a cause of action for compensation or damages. This matter is taken care of by the broad jurisdiction conferred by § 1491, U.S.C., Title 28, *supra*. *United States* v. *Wickersham,* 201 U.S. 390." *Id.* at 190-91.

The decisions in *Wickersham, Simon,* and their progeny are grounded on settled principles of broad application. This Court has repeatedly held, in a variety of contexts, that when federal rights are denied, the courts should employ all remedies necessary and appropriate to make the injured party whole. In *Bell* v. *Hood,* 327 U.S. 678, 684 (1946), for example, the Court concluded:

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

Accord, Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971); *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 239 (1968); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1969); *Mitchell* v. *Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 292 (1959); *Harmon* v. *Brucker,* 355 U.S. 579, 581-82 (1958); *Jackson* v. *United States,* 192 Ct. Cl. 765, 428 F.2d 844 (1970); *Butler* v. *United States,* 365 F.Supp. 1035 (D.C. Hawaii, 1973). *See also Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949); *United States* v. *Causby,* 328 U.S. 256 (1946); *Dooley* v. *United States,* 182 U.S. 222 (1901); and the cases cited in *Dooley* at pages 228-30.

These cases are founded on the commitment of our constitutional system to a "government of laws, and not men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 163 (1803). It is only the exceptional case in which a right will be found to exist without a remedy for a violation of that right.

C. Petitioner Has Not Established a Valid Basis for Excepting Respondents from the General Rule that the Courts Will Provide a Remedy When a Federally Protected Right Has Been Denied.

Petitioner has not suggested a reasonable basis for excepting the violation of respondents' rights from the general rule that a remedy will be provided and denying respondents' access to the one forum where they may seek redress for that violation.[20] It does

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[20] See p. 10 n. 11, *supra*.

contend that the "history of the legal relationship" between the federal government and its employees provides "conclusive evidence of Congress' intention not to permit the recovery of back pay for the period of a wrongful civil service classification" and that "[t]he prevailing rule for many years was that individual personnel actions were not subject to any judicial review." Pet. Br. p. 17.

Neither of these sweeping assertions is supported by the legislative history of the Classification Act of 1949 or the authorities petitioner relied upon. From its inception, this Court has held that the courts are the proper forum for claims of government employees that their protected rights have been violated by the government employer. As early as *Marbury* v. *Madison, supra,* this Court ruled that it had jurisdiction to hear the claim by a plaintiff that his right to a commission as a justice of peace for the District of Columbia had been denied by the Secretary of State who refused to deliver the commission.

Petitioner's *ipse dixit* is not supported by either of the early decisions of this Court to which it refers: *Keim* v. *United States,* 177 U.S. 290 (1900), and *United States* v. *McLean,* 95 U.S. 750 (1878). For example, when *McLean* was decided, the Court of Claims did not have the scope of statutory authority first provided in the Tucker Act. Until enactment of the Tucker Act in 1887 (24 Stat. 505), the Court of Claims' jurisdiction did not include a general grant of authority to award damages.[21] The Tucker Act greatly expanded the Court's jurisdiction and reflected Congress' increasing confidence that the Court could

[21] The Court's original jurisdiction was stated in the Act of February 24, 1855, 10 Stat. 612, Ch. 122.

effectively entertain a wide variety of claims that might be asserted against the government. *Glidden Co.* v. *Zadanok, supra,* 370 U.S. at 556-58. Moreover, not long after the Tucker Act was enacted, this Court held that the Court of Claims' broad jurisdictional grant gave it the inherent authority to award back pay where executive agents failed to act as required by law. *United States* v. *Wickersham, supra,* 201 U.S. at 397-99. In addition, the notion underlying *McLean* that executive action is unreviewable in court except in rare circumstances has been decisively rejected in subsequent developments in the law of judicial review. Today "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140-41 (1967); *accord, Barlow* v. *Collins,* 397 U.S. 159, 165-67 (1970); *Citizens To Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410-14 (1971). And the Court of Claims has found that the reasoning and policy considerations underlying these decisions are equally applicable in that court. *See, e.g., Moore-McCormack Lines, Inc.* v. *United States,* 188 Ct. Cl. 644, 654-66, 413 F.2d 568, 574-80 (1969).

The latter development has found clear expression in the area of government employment. This Court and the Court of Claims have not hesitated to insure that even discretionary governmental actions are exercised in accordance with limitations imposed by the Constitution, statute, or regulations. *See, e.g., Arnett* v. *Kennedy,* 416 U.S. 134 (1974); *Sampson* v. *Murray,* 415 U.S. 61 (1974); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Service* v. *Dulles,* 354 U.S. 363 (1957); *United States*

v. *Wickersham, supra; Chambers* v. *United States, supra; Allison* v. *United States, supra; Piccone* v. *United States,* 186 Ct. Cl. 752, 407 F.2d 866 (1969); *Glidden* v. *United States,* 185 Ct. Cl. 515 (1968); *Fletcher* v. *United States,* 183 Ct. Cl. 1, 392 F.2d 266 (1968); *Berkey* v. *United States,* 176 Ct. Cl. 1, 361 F.2d 983, (1966); *Shaw* v. *United States,* 174 Ct. Cl. 899, 357 F.2d 949 (1966); *Gregory* v. *United States,* 123 Ct. Cl. 794, 107 F. Supp. 840 (1952). Remedies have included the award of back pay for the violation of statutes or executive regulations. *United States* v. *Wickersham, supra; Chambers* v. *United States, supra; Allison* v. *United States, supra; Piccone* v. *United States, supra; Glidden* v. *United States, supra; Fletcher* v. *United States, supra; Berkey* v. *United States, supra; Shaw* v. *United States, supra; Gregory* v. *United States, supra.*

Similarly, *Keim* v. *United States, supra,* stands only for the limited proposition that when executive discretion is exercised in accordance with law, the exercise of discretion may not be disturbed. But the case does not hold, or even suggest, that when executive discretion has been limited, courts are powerless to insure that the limitation has been respected. Although there is dictum in *Keim* that courts do not have general supervisory power over appointments (177 U.S. at 293), this Court went on to consider whether the government complied with a statute limiting the executive's discretion in making appointments and held that "[t]here was no disregard of [the statute] either in letter or spirit." 177 U.S. at 294. Decisions of this Court following *Keim* confirm that it held no more than that the exercise of the executive's power of appointment may not be overturned by a court when

it is exercised in accordance with the law. *See, e.g., Eberlein* v. *United States,* 257 U.S. 82, 84 (1921).[22]

Petitioner further states that there is a "long-standing rule that a federal employee is entitled to receive only the salary of the position to which he was appointed, notwithstanding that he may have performed the duties of another position or the claim that he should have been placed in a higher grade." Pet. Br. p. 18. None of the authorities relied upon by petitioner so held. The central question in each such case has been whether the discretion of the executive, as an employer, to determine employee wage or grade levels is limited in any measure by statute or regulation, or whether the executive has unlimited discretion to make such determinations. In each case cited by petitioner, the Court of Claims (or a district court) inquired into the nature of the executive discretion as set forth in statutes or regulations, and concluded that the executive's discretion was either unqualified or that it had been exercised in accord with whatever limitations had been imposed.

None of these cases supports the proposition that the Court of Claims is powerless to act where the statutory right of government employees to have their positions properly classified has been denied. Nor could they properly do so in view of the myriad decisions cited

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[22] Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 515-16 (1840), and United States v. Black, 128 U.S. 40, 50-52 (1888), referred to in the discussion in *Keim* of the scope of the power of appointment, stand only for the proposition that courts may not review the exercise of agency discretion in cases where the executive has been given unlimited authority to act or make judgments. These cases presented issues similar to those addressed by the Court of Claims in Amundson v. United States, 128 Ct. Cl. 80, 82 (1954), which is cited by petitioner. Pet. Br. p. 18.

above reviewing actions of the government employer to insure that they are in accord with limitations imposed by the Constitution, statute, or regulations. The cases cited by petitioner stand instead for the proposition that the courts may not disturb the exercise of governmental discretion where executive discretion is either unlimited or where it has been exercised in accordance with the prescribed limitations.

Petitioner has similarly failed to find anything in the legislative history of the Classification Act of 1949 remotely suggesting that Congress intended in that Act to create rights without remedies. This silence is fatal in light of the well-settled principle that remedies will be presumed when rights are created and the long history of awards of back pay to government employees based upon an implied cause of action. Acceptance of petitioner's argument would deny a judicial forum to persons who allege a violation of their right to equal pay for equal work. That result should be avoided in the absence of the clearest congressional intent. For, as noted by the Court of Claims in the present case: "When Congress desires to achieve this result [denying a remedy], it knows how to achieve it." 499 F.2d at 691.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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